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Supreme Court, U. S.
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73-1519

IN THE

# Supreme Court of the United States

OCTOBER TERM

1973

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CROSBY & COMPANY, INC.,

*Petitioner,*

*against*

COMPAGNIE NATIONALE AIR FRANCE,
also known as AIR FRANCE,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI

**To the Appellate Division of the Supreme Court of the State of New York, in the First Department**

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PETITION FOR WRIT OF CERTIORARI
To the Appellate Division of the Supreme Court
of the State of New York, in the First Department

Petitioner, Crosby & Company, Inc., respectfully prays that a Writ of Certiorari issue to review the order and judgment of the Appellate Division of the Supreme Court of the State of New York, in the First Department, entered October 30, 1973 (which the Court of Appeals of the State of New York declined to review, by order dated and entered January 16, 1974). That order and judgment

affirmed a judgment of the Supreme Court, New York County, dated and entered June 20, 1973, which, on a motion by the defendant for summary judgment, dismissed the plaintiff's complaint.

THE OPINIONS BELOW

The Justice who considered and granted defendant's motion for summary judgment wrote an opinion which is reproduced at pages 25a-50a* infra. To date, that opinion has not been published in any report.

On appeal to the Appellate Division of the Supreme Court of the State of New York in and for the First Department, from the judgment entered on that opinion, that court affirmed the judgment without opinion (42 A D 2d 1050) by order dated and entered on October 30, 1973 which is reproduced at pages 16a-17a infra.

There was no other opinion apart from two memoranda on intermediate motions which are reproduced at pages 51a-59a infra.

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* Numerals followed by the letter "a" refer to the page number of the Appendix which follows page 47 infra.

## JURISDICTION

(1). The order and judgment sought to be reviewed was dated and entered on October 30, 1973. Thereby the Appellate division of the New York Supreme Court, First Department, affirmed a judgment of the Supreme Court, New York County, dismissing Petitioner's complaint.

A timely motion in the Appellate Division for leave to appeal to the Court of Appeals of the State of New York was made on November 1, 1973 and was denied by an order rendered and entered on November 27, 1973.

Thereafter, on December 18, 1973, a timely motion for leave to appeal was made in the Court of Appeals. It was denied by an order rendered and entered on January 16, 1974.

Copies of the above mentioned orders are appended at pages 18a-20a infra.

The above motions for leave to appeal were made pursuant to Article VI Section 3 of the Constitution of the State of New York and Sections 5513, 5601 and 5602 of the New York State Civil Practice Law and Rules. Under those provisions a unanimous affirmance by an Appellate Division of a judgment

in a civil case which does not raise a constitutional issue, is not further appealable except by leave of the Appellate Division or the Court of Appeals. Such motion may be made to either court within 30 days; if made to and denied by the Appellate Division, a motion may be made in the Court of Appeals within 30 days after such denial.

If the applied for writ is issuable to the New York Court of Appeals rather than to the Appellate Division, it is respectfully prayed that this petition be deemed amended accordingly.

(2). This application is made pursuant to 28 U.S.C. 1257 (3) as a case where a right, privilege or immunity is specially set up or claimed under treaties or statutes of the United States.

The treaty involved is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw, Poland, on October 12, 1929, as amended, commonly known as "The Warsaw Convention" (49 Stat. 3000 et seq., T.S. 876; Appendix 49 U.S.C.A. pp. 87-91).

The pertinent statutes of the United States are the "Federal Aviation Program" of 1958, 49 U.S.C. 1301 et seq.

THE QUESTIONS PRESENTED FOR REVIEW

The questions presented by this case are:

1. Does the Warsaw Convention apply to the February 20, 1968 contract, described below, for 2,000,000 pounds of horse meat to be shipped in weekly instalments of 80,000 pounds?

2. If it does, do the exculpatory provisions and limitations, by their terms, apply or have those provisions been misconstrued?

3. Similarly, does the Federal Aviation Act or tariffs filed thereunder apply to the contract, there being no preference, rebate or discrimination?

4. Do the exculpatory provisions or limitations in a March 1968 air waybill covering a trial shipment of 21,795 pounds apply to the 2,000,000 pound February 20, 1968 contract?

5. Being in minuscule and illegible print,

do the provisions on the reverse side of the air waybill have any effect?

Each of those questions was decided in favor of Air France whereas Petitioner maintains that each should have been decided in Petitioner's favor.

This action, in which the above questions arise, is for damages for the frustration by the respondent (hereinafter referred to as Air France) of a contract between (i) Petitioner as a seller (in the United States), (ii) a Purchaser in France and (iii) Air France as a foreign international carrier by air. The contract was entered into on February 20, 1968 for the sale by Petitioner to the Purchaser and for carriage by Air France from New York to the Purchaser in Toulouse, France, of 2,000,000 pounds, in weekly instalments of 80,000 pounds, of frozen fresh killed horse meat for human consumption. At the instance of the Purchaser, the contract included a provision for a trial shipment and a clause reading: "This contract will be void if quality

of meat on trial shipment is not satisfactory to Marino Bondi" (the Purchaser). Air France culpably mishandled the trial shipment. In consequence, the Purchaser exercised his reserved right to "void" the contract. This action against Air France is for the consequent loss of profits.

Air France interposed as defenses provisions of the Warsaw Convention (see pp. 83a-96a infra) and urged also provisions of the Federal Aviation Act and provisions said to be contained in Air France's "Air Cargo Rules Tariff" filed pursuant to that act and, also, provisions in its air waybill covering only the March 1968 20,795 pound trial shipment. On the basis of those defenses, the complaint was dismissed by a summary judgment.

THE TREATY AND STATUTES INVOLVED

Articles 1, 5, 6, 8, 9, 10, 11, 18, 19, 20, 21-26, 28, 29 and 33 of the Convention for the Unification of Certain Rules relating to International Transportation by Air, signed at Warsaw, Poland, on October 12, 1929, usually known as the

Warsaw Convention (49 Stat. 3000 et seq; Appendix 49 U.S.C.A. pp. 87-91) which defendant invoked, or have a bearing thereon, are set forth at pages 1a-10a infra.

The defendant invoked also 49 U.S.C. Chapter 20, Section 1301 et seq. All of the relevant portions of that Chapter, including Section 1373(a) are reproduced at pp. 11a-14a infra.

Defendant invoked also "Rule 2 (D)" of its "Local and Joint International Air Cargo Rules No. CR-2". That is set forth at page 15a infra. Presumably, nothing else on file with the Civil Aeronautics Board is material.

## STATEMENT OF THE CASE

### The Sued On Contract

As already stated, the action herein is for damages for causing the frustration of a contract between (i) Petitioner as a seller (in the United States), (ii) a purchaser in France, and (iii) Air France as an international carrier by

air, for the carriage from New York to the purchaser in Toulouse, France, of 2,000,000 pounds, in weekly instalments of 80,000 pounds, of frozen fresh killed horse meat for human consumption.

The contract is reproduced at pages 60a-69a infra.

It stipulated that the horse meat be frozen at the plant "to a temperature of 14° Fahrenheit" (pp. 60a-61a infra) and it stipulated that the temperature "on arrival" should be between zero and two degrees centigrade during the winter and between two and four degrees centigrade during the summer (pp. 64a, 65a infra). At the instance of the purchaser, the contract incorporated a provision for a trial stipulation and a clause reading: "This contract will be void if quality of meat on trial shipment is not satisfactory to Marino Bondi" (the purchaser).

The contract was solicited by Air France, through its "Sales Representative" in the New York Cargo region. It was entered into after a year of negotiation, initiated, persevered in and conducted

by that Sales Representative and his Superior, the New York Cargo District Manager (Record on Appeal* in the Appellate Division pp. 43-9, 133-41, 147-50, 172, 184-204).

The record shows that the Sales Representative, in pre-trial examination, testified that his duties were "to sell and promote the ... of air cargo transportation in general" (R A 47) and that his purpose in negotiating with Petitioner and the purchaser was "mainly to arrange for the transportation of the horse meat ... to arrange a course ... a series of transactions ... to get that traffic" (id. 148-9).

The contract consisted of a letter dated February 1, 1968, from the plaintiff addressed to Air France, Cargo Division, was "accepted" by the purchaser with two amendments and by Air France with a signature in its behalf by its Cargo District Manager "as per letter NYC. FF dated Feb.

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* Hereinafter referred to as RA

16th Feb 20, 68" (p.64a infra). (The "Feb 20, 68" at the foot of plaintiff's letter of February 1, is the date of the signature by the Manager.) The letter of February 16th thus incorporated, was addressed to plaintiff, was signed by the same New York Cargo District Manager and was "accepted" by the plaintiff (p. 69a infra).

Performance of the contract would have yielded Air France $380,000 (at the rate of 19 cents per pound) for the carrying of the 2,000,000 pounds of meat from New York to Toulouse.

Because that revenue and plaintiff's prospective profit hinged on satisfaction with the trial shipment, the trial shipment was accompanied by Air France's Sales Representative and also by a representative of the plaintiff on the plane, and both proceeded to Toulouse (R A 153, 159-169).

Air France's Culpable Mishandling of The Trial Shipment

Despite the pivotal importance of the trial shipment, Air France, concededly, so egregiously mishandled the trial shipment that the horse meat arrived in Toulouse, France, in so putrefied condition, that upon its arrival it was condemned by the French Health Authorities, in the presence of Air France's "Sales Representative" and the plaintiff's representative, and then was destroyed by those authorities.

Air France (for the purpose of its motion for summary judgment) conceded that: it exposed the meat, after its arrival at Kennedy Airport, for over 15 hours in the open air before loading it on the plane; it crammed the meat into a plane which had no refrigeration; it delayed the departure of the plane for a number of hours; upon the arrival of the horse meat at Orly Airport, Paris, instead of immediately shipping it to Toulouse by air, where it would have arrived within an hour, defendant stuck the meat into a truck which was

too small and unrefrigerated or inadequately refrigerated and which did not arrive in Toulouse until 24 hours later.

The Purchaser's Cancellation of the Contract

Naturally, the Toulouse purchaser was dissatisfied with the quality of the trial shipment meat upon its arrival, and he exercised his reserved right to "void" the contract.

In consequence, the plaintiff, in the words of the complaint, "was deprived of the profit it would have made on this sale ... of the two million pounds provided for in the ... agreement", amounting to $100,000.00.

Air France's Invocation of the Warsaw Convention Limitations and Immunities

To the complaint for the lost profits of $100,000.00, Air France, in its answer (reproduced at pp.81a-100a infra), included four defenses predicated on the Warsaw Convention. It cited and quoted Articles 1, 5, 8, 10, 11, 18, 19, 20, 21,

22, 24 and 26 (see pp. 84a-96a infra ) and demanded "judgment dismissing the complaint against it, and in the alternative, for judgment limiting its liability under the provisions of the Warsaw Convention ...".

The Motion for Summary Judgment

In moving for summary judgment of dismissal, the affidavit of one of the attorneys for Air France referred to a previous motion by the plaintiff for the dismissal of Air France's affirmative defenses "on the ground that they respectively failed to set forth the material elements of a defense and failed to state a defense, and on their face, have no merit ..." and that motion had been denied with a memorandum.* The affidavit for Air France continued:

> "Defendant has denied and continued to deny, inter alia, the accuracy of the plaintiff's description of the facts

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* The memorandum is reproduced at pp. 51a-53a infra.

> forming the basis of this action. However, for the purposes of this motion for summary judgment, except as set forth in the accompanying affidavit of Stephen Mackevicius, the defendant will assume, arguendo, the accuracy of plaintiff's factual allegations (not the legal conclusions) in paragraphs 5 through 8 of plaintiff's complaint and paragraphs 2 through 10, 12 through 17, 19, 20 and 22 of the plaintiff's bill of particulars, ..."

In the referred to accompanying affidavit of Mackevicius, Air France's "Legal Services Manager", he added as a further basis for judgment in its favor "pertinent [emphasis added] portions of Air France Cargo Rules Tariff No. CR-2, C.A.B., No. 17 which was filed pursuant to the Federal Aviation Act with the Civil Aeronautics Board and which was in effect on March 12, 1968" (R A 93-4). Reliance was limited to "Rule 2(D)" of those "pertinent portions" (R A 94). That read (R A 105; p. 15a infra):

"All carriage of cargo governed by this tariff shall be subject to the rules, regulations and conditions of carriage in effect on the date that the transportation begins"

Mr. Mackevicius continued (R A 94):

"Those conditions of carriage are set forth on each air waybill and appear on the aforementioned air waybill covering the shipment in question".

And he argued (R A 94):

"Those conditions of carriage limited Air France's liability and also limited the time permitted for the plaintiff to give written notice of its claim. These limitations reflect those of the Warsaw Convention, which was also applicable to the transportation in question" (Id).

The tiny crowded print on the reverse side (p. 75a infra) of the air waybill/which Air France prepared (and the delivery of which is disputed) is the only document which is claimed to have given actual notice

of the claimed limitations.

The Memorandum Decision

The Justice who granted the motion for dismissal, in his 25 page Memorandum Decision (pp.25a-50a infra), at the outset of his decision, expressed the conclusion (pp. 30a-31a infra):

> "Air France's only legal obligation under the alleged agreement was to act as a transfer agent of funds for [the purchaser] Marino Bondi" [emphasis added].
>
> * * * * *
>
> "Consequently, there was no question at the time the alleged agreement was entered into, that the only obligation that could have been legally imposed upon Air France under the agreement was to act as a transmittal agent for Marino Bondi's funds . . . Any obligation of Air France to avoid wrongful acts or omissions in transporting the

trial shipment to France did not arise under the alleged agreement" [emphasis added].

The Justice added (p. 33a):

"It seems noteworthy that a portion of Section 6 [of the contract] reads as follows:

'Conditions of carriage in regards to this traffic shall be those as convened on the transportation contract shown on the air waybill.' [Emphasis added]

Since the air waybill "included a limitation of liability", the Justice hopped to the conclusion that "those conditions of carriage" applied

"to all shipments proposed in the plaintiff's letter of February 1, 1968, and not just to the shipment eventually transported under an air waybill on which these conditions appear." (pp. 33a infra; emphasis added).

There follow over 15 pages (pp.34a-50a infra)

of discussion of the Warsaw Convention, the Federal Aviation Act and Air France's Rules Tariff No. CR-2, C.A.B. No. 17, with citations and quotations of numerous cases* which led him to the conclusion that the liability and notice of claim limitations in the Warsaw Convention applied to the frustration of the 2,000,000 pound contract and also that the contract was "governed by the provisions of the Federal Aviation Act ... and, consequently this Act and the Tariffs filed in conformance and compliance therewith are the exclusive sources of the regulations and interpretations of the contract of carriage" (p. 37a infra).

These tariffs, the Justice continued, "containing [Air France's] rules and regulations" ... control this case. Thereunder the "conditions of carriage" that were set forth on the air waybill were "binding" and two provisions therein, "a limit of liability and a time limited for claim ... dispose of the plaintiff's action herein" (p.42a infra; emphasis added).

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* without noting the distinction between domestic and international carriage

Accordingly, the Justice concluded, "On the defendant's motion for summary judgment, the complaint should be dismissed ..." (p. 50a infra). Such a judgment was thereafter entered. A copy thereof appears at pages 21a-24a infra.

Petitioner's Appeal

A timely appeal was prosecuted in the Appellate Division. Air France reiterated all its contentions and added a suggestion that the contract, as viewed by the plaintiff, was illegal, citing Feraco Inc. v. Georgia Pacific Corp., 313 F. Supp. 660, 662 (D.C. Del. 1970), and United States v. Associated Air Transport, 275 F 2d 827 (5th Cir. 1960).

As previously noted, the Appellate Division affirmed the judgment, without any comment whatsoever.

The Subsequent Proceedings

As noted at pages 3-4 supra, successive timely motions to the Appellate Division and the Court of Appeals for leave to appeal to the Court

of Appeals were respectively denied by orders dated and entered respectively on October 30, 1973 and January 16, 1974. Copies of those orders are appended at pages 18a-20a infra. Each of the denials was without any comment.

## REASONS FOR ALLOWANCE OF THE APPLIED FOR WRIT

1. It is manifest that the case is governed exclusively by Federal Law.

The basic question is whether, by reason of the Warsaw Convention or by reason of the Federal Aviation Act or Air France's tariff thereunder or its March 12, 1968 air waybill for the 21,795 pound trial shipment or, possibly, as a matter of public policy - all of which are matters of Federal law - the agreement between the parties, as set forth in their signed and integrated writings, immunized Air France from liability for frustrating the February 20, 1968 two million pound contract by inexcusable and appalling mishandling of the critical trial shipment.

If any of those codes apply to the February 20, 1968 contract, another question is: Is petitioner's claim for the culpable frustration thereof by Air France barred by the terms of any of their exculpatory and limitation provisions?

It has been and is petitioner's position that

(a) The Warsaw Convention and the air waybill and the filed tariff applied only to the 21,795 pounds of the meat shipped in March 1968 and had no effect on the February 20, 1968 contract providing for 25 weekly shipments.

(b) Even if deemed applicable, the limitations as written do not have the exculpatory effect attributed to them - for a number of reasons which are set forth in the course of pages 33-45 infra.

(c) The air waybill, moreover, can be given no effect whatsoever in respect to an international carriage under the rule of Lisi v. Alitalia-Linee Aeree Italiane, 370 F 2d 508 (2d Cir. 1966) affd 390 U.S. 1039 (1968), and there is no substance in the contention

that the rule is limited to passenger tickets and baggage checks and does not apply to air waybills despite the uniformity of the Convention language in regard to all three of those categories.

2. The basic questions thus presented, it is submitted, are of substantial general importance to this country's international trade. The Justice who dismissed the complaint correctly characterized this case as a "significant commercial controversy" (p. 29a infra; emphasis added)

The February 20, 1968 contract is not an isolated engagement. It is apparent that Air France employs "sales representatives" who solicit term contracts for a course or a series of periodic carriage of cargo. In the words of the "Sales Representative" who, in association with Air France's "Cargo District Manager", solicited and negotiated the contract in this case, his duties were to "sell and promote the service of air cargo transportation in general" and his particular purpose in this case was "to arrange a course ... a series of transactions ... to get

that traffic" (RA 147-9). Presumably, other airlines do likewise.

Such contracts are highly advantageous to the carrier, shipper and consignee. They assure the carrier specified quantities of cargo at specified times - here during a specified period 25 weekly shipments of an aggregate of 2,000,000 pounds and $380,000 of revenue; they assure business concerns the necessary space and facilities for carriage at specified times - here 2,000,000 pounds in 25 weekly instalments and $530,000 of revenue; they assure the purchaser continuity of delivery of specified quantities at specified times.

If such a contract may be breached by the carrier with impunity, then the commercial community should have notice of it by a decision of this Court. Why should such a business-getting and business assuring contract be treated differently from any other business contract which carriers may enter into?

It is respectfully suggested that rather shocking is the holding in this case that under a

term contract for $380,000 cargo revenue to the carrier and $100,000 or $130,000 profit to the shipper, the carrier is totally immune from liability for the loss it caused the plaintiff by culpably mishandling the trial shipment upon which, to the carrier's knowledge, the contract hinged.

3. Neither the Warsaw Convention nor Chapter 20 of 49 U.S.C. nor Air France's tariffs thereunder proscribe (or provide for) such term contracts. Hence, it is submitted that breaches are subject to common law principles. On that basis, the Court of Claims in Northwest Airlines Inc. vs. United States, 444 F 2d 1097 (1971), enforced a provision in a term contract for advanced blocked-space that such space when not properly cancelled and not used should be fully paid for as stipulated in the contract.

4. In essence, there is no distinction between a contract of the nature here involved and a reservation of a seat for a specific flight.

Whatever exculpatory provisions may be set forth in a flight ticketdoes not apply to the engagement to furnish the passage, and for a breach of that engagement, the carrier is held liable for whatever damage such breach causes and,in addition, is assessed exemplary damages (Wills v. Transworld Airlines, Inc., 200 F. Supp. 360 (D.C., S.D.Cal., (1961) - actual damage $1.54, exemplary $5,000; Nader v. Allegheny Airlines, Inc., ( U.S.D.C., D.C. 10/18/73, 42 U.S.L.W. 2233, not otherwise reported - actual damage $20, exemplary $50,000).

Similarly, in holding a railroad liable for the damage caused by its failure to perform an agreement to furnish a railroad car on a specific date for the transportation of cattle to a specific market on a specific market day, the New York Court of Appeals in Clark v Ulster & Delaware Railroad Company, 189 N Y 93(1907), disregarded the fact that the railroad's standard live stock transportation contracts excluded liability for such failure. The Court distinguished contracts for prospective carriage from contracts which cover

actual carriage and refused to import into the former the limitations of the carriage contract.

5. Prohibitions of "any undue or unreasonable preference or advantage" or of "any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatever"/(49 U.S.C. 1374(b)) do not apply, since there is no claim and not an iota of evidence that the contract gave plaintiff or Bondi any such advantage or, in any way, was prejudicial to any other shipper, actual or potential.

6. There appears to be no authority in support of the determination which is sought to be reviewed.

Neither of the two cases cited by Air France - Feraco Inc. v. Georgia Pacific Corp., 313 F. Supp. 660 (D.C. Dec. 1970) nor United States v. Associated Air Transport, supra, 275 F 2d 827 (5th Circ. 1960)- has any application.

In the Feraco case, there was an oral understanding, the performance of which, the Court found, involved preferential treatment and shutting out of others' shipments. Moreover, the defendant

was a domestic motor freight carrier.

The case against Associated Air Transport has absolutely nothing in point; on the contrary, although there were term contracts in that case, there was no suggestion that for that reason they were illegal.

7. In the absence of the erroneous notion that an international carrier (foreign or domestic) may not enter into contracts for carriage over a period of time, it seems inconceivable that the Justice who dismissed this case or any competent Judge would hold that the February 20, 1968 contract was devoid of "legal obligation" other than to act as a transfer agent of funds. The specific provisions for (i) weekly deliveries by plaintiff to Air France's "JFK International Airport Cargo Building #86", (ii) for air waybills to be issued at the "JFK's office", (iii) for payments to be made to plaintiff by Air France out of funds which (iv) the purchaser agreed to "deposit with Air France" - considered cumulatively - inexorably implied a reciprocal

undertaking by Air France to accept and properly carry the specified weekly instalments and to receive from the purchaser the funds he undertook periodically to deposit and to pay the petitioner therefrom as specified. Only if the purchaser failed to make his promised deposits was Air France to be free of liability.

It is noteworthy that the Justice in this case did not say that the contract by its terms imposed no obligation on Air France as a carrier - which was its primary business - other than to act as a transfer agent of funds. What the Justice said is that the contract imposed upon Air France only the "legal obligation ... to act as a transfer agent (pp. 30a-31a infra; emphasis added). Thereby, he clearly was construing the contract on the basis of what he conceived to be the legal limitations and not its language.

In any event, since the contract was for international carriage from the United States by a foreign carrier governed by Federal law acting under a Federal permit issued under a Federal statute

and subject to the jurisdiction of a Federal agency, it is submitted that the construction of the contract is a matter of Federal law and thus is reviewable by this Court. Surely, in such a case this Court is not bound by a misconstruction of such a contract (United States v. Pink, 315 U.S. 203, 217-18 (1942); Cornell Steamboat Company v. Phoenix Construction Co.,233 U.S. 593, 599 (1914); St. Louis and Iron Mountain Railway v. McWhiter, 229 U.S. 265, 276-7 (1913)), especially in a case where under the authentic New York law* there can be no doubt that Air France obligated itself to act as a carrier by air from New York to Toulouse of the 2,000,000 pounds, at specified times, in a specified way, with due care, so long as the contract was performed by the Petitioner and by purchaser Bondi. Clearly, the contract was fully mutual and reciprocal in all its phases and bound Air France to properly perform its part so long as the contract was performed by the other two parties.

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* E.g. Wood v. Duff-Gordon, 222 N.Y. 88 (1917); Marks v. Cowdin, 226 N.Y. 138, 143 (1919); Muzak Corp. v. Hotel Taft Corp., 1 N.Y. 2d 42, 46-7 (1956)

## SUPPORTING ARGUMENT

### I

### THE WARSAW CONVENTION DOES NOT APPLY TO CAUSES OF ACTION FOR FRUSTRATION OF TERM CONTRACTS AS DISTINGUISHED FROM CAUSES OF ACTION FOR THE VALUE OF A SHIPPED CARGO OR FOR DAMAGE THERETO.

The basic contention that the Warsaw Convention applies only to contracts *of* shipment and not contracts *for* shipment, as set forth at pages 21-30 *supra*, petitioner believes requires hardly any supplementation.

The distinction between the air waybill (assuming it valid) covering the March 1968 21,795 pound shipment and the 2,000,000 pound contract of February 20, 1968, seems obvious. That distinction was pointedly made in *Clark* v. *Ulster & Delaware Railroad Company*, 189 N.Y. 93 (1907) *supra*. The distinction also is the implicit rationale of *Northwest Airlines* v. *United States*, 444 F 2d 1097 (1971) *supra*, of *Wills* v. *Transworld Airlines Inc.*, 200 F. Supp. 360 (1961) *supra*, and of *Nader* v. *Allegheny Airlines Inc.* *supra*.

The distinction, moreover, appears in the terms of the February 20, 1968 contract. That document makes no mention of the Warsaw Convention. Nor does it set forth any limitations of liability under the contract. Indirectly, it provides only:

> "Conditions of carriage in regards to this traffic shll be those as convened on the transportation contract shown on the air waybill" (emphasis added).

Thus, the air waybill to be issued for each shipment will constitute "the transportation contract" containing the "conditions of carriage" governing that shipment. Nothing is said by way of limiting liability under the overall contract other than in case the purchaser defaults in his obligation to deposit funds. Moreover, the reference for "conditions of carriage" is to the "air waybill" and not the Warsaw Convention.

Although the distinction seems obvious and finds implicit support in the above mentioned cases, there is absent a direct controlling authority which,

this case demonstrates, is needed for the guidance and protection of the business community which engages in international trade depended upon international carriage by air.

II

EVEN IF THE SUED ON CONTRACT BE DEEMED TO BE WITHIN THE PURVIEW OF THE WARSAW CONVENTION, THE INVOKED LIABILITY LIMITATIONS TEXTUALLY ACCORD NO DEFENSE.

The pertinent provisions of the Convention (with added underscoring) are:

"Article 1

(1) This convention shall apply to all international transportation ... performed by aircraft for hire ...

. . . . .

Article 8

The air waybill shall contain the following particulars:

. . . . .

(m) The amount of the value declared in accordance with article 22(2);

. . . . .

(q) A statement that the transportation is subject to the rules relating to liability

established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

. . . . .

Article 18

(1) The carrier shall be liable for damage sustained ... if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

. . . . .

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air ...

. . . . .

Article 22

. . . . .

(2) In the transportation of ... goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor had made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and had paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

. . . . .

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the

damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

. . . . .

Article 26

. . . . .

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

. . . . .

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

. . . . .

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

. . . . . "

Here the horse meat was in a plane only about 8 of the approximately 60 hours which intervened between arrival of the 21,795 pounds at Kennedy Airport on March 11, 1968 at about noon and the arrival thereof at Toulouse on March 14th at about 5 A.M. local time (approximately midnight New York time).

Of the other 52 hours, the horse meat was in a properly refrigerated truck the first 10 hours; then, at the direction of Air France's personnel, over petitioner's protest, the horse meat was removed from the truck and put out in the open air until the afternoon of the following day; then the

horse meat was crowded into an unrefrigerated plane which took the horse meat to Orly Airport; then, instead of transporting the meat to Toulouse by air which would have taken about an hour (RA 159), the horse meat was crammed into an unrefrigerated or inadequately refrigerated undersized truck which did not arrive at Toulouse until 23 or 24 hours later (RA 72-6, 149-167, 172-4).

Did the putrefaction take place before arrival at Toulouse? Or most likely, as the evidence indicates, did it take place during the 24 hours in the unauthorized transportation by truck from Orly Airport to Toulouse?

Be that as it may, the totality of the conceded mishandling of the cargo, as outlined above and at pages 12-13 supra, certainly constituted "wilful misconduct or ... such default on [the part of the carrier] as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent of "wilful misconduct", and, under Article 25 of the Convention disentitles the carrier from availing itself "of

the provisions ... which exclude or limit his liability".

It is also of some significance that where the liability limitation in Article 22 applies, the amount of the liability in the absence of a declaration is "250 francs per kilogram" ($7.52 per pound (p. 35a infra). That, for the 21,795 pounds, amounted to $163,898.40 - $63,898 in excess of the $100,000 sued for herein. Thus the amount sued for did not entail a "supplementary" charge.

The notice of claim requirements in Article 26 of the Convention, even if the Convention applied, would have no effect on this case. That is so for each of four reasons:

1. They are excluded by Article 25 which nullifies them in cases of "wilful conduct" or its equivalent.

2. Article 26 provides for notice only by "the person entitled to delivery". The Convention contains no provision for notice by any other person. Thus notice is not required

of claims of persons other than the one "entitled to delivery".

3. Air France on March 26, 1968 informed petitioner "that Bondi has taken steps to file a claim for the total loss of the shipment" (p. 101a infra). Presumably, since nothing was said to the contrary, that claim was deemed timely. If it be argued that such a limited claim by the "person entitled to delivery" did not cover the claim made here, that can serve only to emphasize the inapplicability of Article 26. Surely the petitioner's rights which were not derived from the consignee could not be prejudiced by what the 'person entitled to delivery' chose to do by way of a claim. Obviously, the consignee could make a claim only for himself and not for petitioner.

4. Air France's "Sales Representative" accompanied the shipment on the plane and was at Toulouse on the morning of the arrival of the horse meat there. He received immediate and

direct notice of the condition in which the horse meat arrived and of the condemnation and destruction thereof by the health authorities. On March 26, 1968 Air France's New York Cargo District Manager, in the letter already mentioned, informed petitioner thereof (p.102a infra). He also informed petitioner that there would be no further shipments until Bondi advised Air France otherwise and promised: "We shall not fail to keep in touch ...".

III

INSOFAR AS THE DEFENSES DEPEND UPON THE AIR WAYBILL, THEY ARE RULED OUT ALSO BY THE DOCTRINE OF LISI V. ALITALIA-LINEE AERREE ITALINE, 370 F 2d 508 (2d CIR. 1966), AFFD. 390 U.S. 1039 (1968)* AND EGAN V. KOLLSMAN INSTRUMENT CORPORATION, 21 N Y 2d 160 (1967).

(1). The air waybill has no significance other than as an incorporator (if valid) of the Warsaw Convention as setting forth the "conditions of [the] carriage" of the 21,795 pounds of horse meat covered thereby.

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* Rehearing denied 391 U.S. 929.

(2) However, it did not fulfill even that function, for several reasons.

Whether the air waybill was delivered to the petitioner is a disputed issue (RA 73, 77, 172-6, 208). That dispute, of course, is not resolvable without an evidentiary hearing, and none took place.

It is not disputed that the relied on air waybill was made out by Air France, not by the consignor as required by the Convention; and the consignor was not consulted. The value specified in the air waybill apparently was taken from the invoice to purchaser Bondi.

Above and beyond the foregoing, it is not disputable that the "conditions of contract" appearing on the reverse side of the air waybill are at least of as minuscule type and illegibility as those contained in the above mentioned Lisi and Egan cases. An examination of the accurately reproduced air waybill at pages 74a-75a (note especially 75a), infra demonstrates that the air waybill in this case falls within the condemnation

of those cases.

Those cases establish that to have any legal effect, provisions in an air waybill of international cargo must be in reasonably large and distinct type.

While those cases arose under passenger tickets or baggage checks, no reason is apparent for holding them inapplicable to transportation of cargo under air waybills, since the provisions in the Convention as to each of the categories are completely parallel.

Article 3, in respect to passenger tickets provides:

"(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention

which exclude or limit his liability.'

Article 4, in regard to baggage checks provides:

"(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

In respect to air waybills, Article 5 provides:

"(2) The absence, irregularity, or loss of [an air waybill] shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention."

And the thus referred to Article 9 provides:

> "If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability."

Under such completely parallel language, if minuscule type and illegibility are the equivalent of total absence of a passenger ticket or of a baggage check containing the specified requirements, then it inexorably seems to follow that an air waybill of that character likewise is a nullity.

However, there appears to be no specific authority to that effect or to the contrary.

(3). The court below was misled by the numerous cases which he cited holding that the filed tariffs govern regardless of absence of notice of their provisions. He failed to realize that those cases related exclusively to domestic transportation and do not apply to international carriage governed by the procedures required by the Warsaw Convention.

## IV

**THE FEDERAL AVIATION STATUTES (49 U.S.C. 1301 ET SEQ) AND AIR FRANCE'S RULES TARIFF FILED THEREUNDER HAVE NO SIGNIFICANT IMPACT ON THIS CASE.**

In respect to the regulation of foreign air carrier-shipper duties and obligations, the federal statutes do no more than (i) recognize the paramountcy of the Warsaw Convention (49 U.S.C. 1501), (ii) require the filing of tariffs and adherence thereto, and (iii) prohibit discrimination (49 U.S.C. 1301, 1372-4).

Of Air France's filed "Cargo Rules Tariff", it invoked and quoted only Rule 2(D) which read (15a infra):

> "Effective Rules: All carriage of cargo governed by this tariff shall be subject to the rules, regulations and conditions of carriage in effect on the date that the transportation begins."

Obviously, by itself that is wholly meaningless.

V

IN THE ABSENCE OF A VALID LIMITATION OF LIABILITY, PETITIONER CLEARLY IS ENTITLED TO ITS LOSS OF PROFITS.

American Synthetic Rubber Corp. v. Louisville & Nashville Railroad, 422 F 2d 462, 467 (6th Cir. 1970)

Whitlock Truck Service Inc. v. Regal Drilling Co., 333 F 2d 488 (10th Cir. 1964)

Marquette Cement Manufacturing Co. v. Louisville & Nashville Railroad, 281 F.Supp. 944, affd. 406 F 2d 731 (6th Cir. 1969)

Czarnikow-Rionda Co. v. Federal Sugar Refining Company, 255 N.Y. 33, 41-7 (1930)

CONCLUSION

It is respectfully submitted that the prayed for writ of certiorari should issue.

Respectfully submitted,

COPAL MINTZ
Counsel for Petitioner

April 8,1974.

# WARSAW CONVENTION

## 49 Stat. 3000

[Cited Portions]

* * * * *

### CHAPTER I. SCOPE—DEFINITIONS

*Article 1*

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

*Article 2*

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

CHAPTER II. TRANSPORTATON DOCUMENTS

* * * * *

## SECTION III.—AIR WAYBILL

*Article 5*

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill": every consignor has the right to require the carrier to accept this document.

WARSAW CONVENTION (Continued)

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

*Article 6*

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

* * * * *

*Article 8*

The air waybill shall contain the following particulars:

* * * * *

WARSAW CONVENTION (Continued)

(*m*) The amount of the value declared in accordance with article 22(2);

* * * * *

(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention.

*Article 9*

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

*Article 10*

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

*Article 11*

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

* * * * *

WARSAW CONVENTION (Continued)

## CHAPTER III. LIABILITY OF THE CARRIER

* * * * *

### *Article 18*

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

### *Article 19*

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

WARSAW CONVENTION (Continued)

*Article 20*

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

*Article 21*

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

*Article 22*

* * * * *

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

*Article 23*

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

*Article 24*

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

*Article 25*

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his

part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

*Article 26*

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

* * * * *

WARSAW CONVENTION (Continued)

*Article 28*

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

*Article 29*

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

* * * * *

CHAPTER IV. PROVISIONS RELATING TO COMBINED TRANSPORTATION

*Article 31*

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, pro-

vided that the transportation by air falls within the terms of article 1.

* * * * *

## CHAPTER V. GENERAL AND FINAL PROVISIONS

* * * * *

### *Article 33*

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

* * * * *

[CONTINUED ON NEXT PAGE]

# FEDERAL AVIATION PROGRAM
49 U.S.C. 1301 et seq.
72 Stat. 737; 75 Stat. 467;
76 Stat 143.

## SUBCHAPTER I.—GENERAL PROVISIONS

### § 1301. Definitions

As used in this chapter, unless the context otherwise requires—

* * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

* * * * *

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

* * * * *

### § 1372. Permits to foreign air carriers—Necessity

(a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

Issuance

(b) The Board is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest.

* * * * *

### § 1373. Tariffs of air carriers—Filing, posting, and publication; rejection of tariffs

(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent

## FEDERAL AVIATION PROGRAM (Continued)

required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

**Observance of tariffs; granting of rebates**

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs, and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis.

## FEDERAL AVIATION PROGRAM (Continued)

**Notice of change in tariff**

(c) No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

**Filing of divisions of rates and charges**

(d) Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates. Pub.L. 85-726, Title IV, § 403, Aug. 23, 1958, 72 Stat. 758; Pub.L. 86-627, July 12, 1960, 74 Stat. 445.

* * * * *

### § 1374. Rates for carriage of persons and property; duty to provide service, rates, and divisions; discrimination

(a) [Relates only to "air carrier"; by Pub.L. 92-259, §1, Mar. 2, 1972, 86 Stat. 95 a paragraph was added applicable to "every air carrier and foreign air carrier" and by reason of its date is not applicable.]

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Pub.L. 85-726, Title IV, § 404, Aug. 23, 1958, 72 Stat. 760.

* * * * *

FEDERAL AVIATION PROGRAM (Continued)

**§ 1502. International agreements**

In exercising and performing their powers and duties under this chapter, the Board and the Administrator shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, and shall take into consideration any applicable laws and requirements of foreign countries and the Board shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided*, That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement, heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest. Pub. L. 85-726, Title XI, § 1102, Aug. 23, 1958, 72 Stat. 797.

* * * * *

COMPAGNIE NATIONALE AIR FRANCE

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LOCAL AND JOINT INTERNATIONAL AIR CARGO RULES
TARIFF NO. CR-2

Containing

RULES AND REGULATIONS

Governing

LOCAL AND JOINT INTERNATIONAL GENERAL COMMODITY AND SPECIFIC COMMODITY RATES AND CHARGES

* * * * *

CARGO RULES TARIFF NO. CR-2

Rule 2: Applicability of Tariff

(A) General

This tariff shall apply to carriage of cargo, including all services incidental thereto, performed by Carrier, under rates and charges of Carrier contained in tariffs which make specific reference to this tariff for governing rules, regulations and conditions of carriage.

(B) Gratuitous Carriage: (Rule Cancelled)

(C) Change without Notice: (Rule Cancelled)

(D) Effective Rules: All carriage of cargo governed by this tariff shall be subject to the rules, regulations and conditions of carriage in effect on the date that the transportation begins.

* * * * *

ORDER AND JUDGMENT (OF APPELLATE DIVISION)
SOUGHT TO BE REVIEWED

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 30, 1973.

Present-Hon. Emilio Nunez, Justice Presiding
Theodore R. Kupferman
Francis T. Murphy, Jr.
Myles J. Lane
Aron Steuer, Justices.

| | |
|---|---|
| Crosby & Company, Inc., | Order of Affirmance on Appeal |
| Plaintiff-Appellant, | from Judgment |
| -against- | 7617 |
| Compagnie Nationale Air France, a/k/a Air France, | |
| Defendant-Respondent. | |

An appeal having been taken to this Court by the plaintiff-appellant from the judgment of the Supreme Court, New York County (Asch,J.), entered on June 20, 1973, granting defendant's motion dismissing plaintiff's complaint, granting defendant's counterclaim for summary judgment, and directing that defendant recover of

ORDER AND JUDGMENT (OF APPELLATE DIVISION)
SOUGHT TO BE REVIEWED

the appellant the aggregate sum of $891.31, and said appeal having been argued by Mr. Copel Mintz of counsel for the appellant, and by Mr. William J. Junkerman of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, without costs and without disbursements.

ENTER:

HYMAN W. GAMSO

Clerk

## APPELLATE DIVISION ORDER DENYING LEAVE TO APPEAL TO COURT OF APPEALS

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 27, 1973

Present - Hon. Emilio Nunez, Justice Presiding

Theodore R. Kupferman,

Francis T. Murphy, Jr.,

Myles J. Lane,

Aron Steuer, Justices.

[SAME TITLE]

The above named plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on October 30, 1973,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of Copal Mintz in support of said motion, and the affidavit of Randal R. Craft, Jr., in opposition thereto, and after hearing Mr. Copal Mintz for the motion, and Mr. Randal R. Craft, Jr., opposed,

APPELLATE DIVISION ORDER DENYING LEAVE
TO APPEAL TO COURT OF APPEALS

It is ordered that said motion be and the same is hereby denied with $20 costs.

ENTER:

HYMAN W. GAMSO

Clerk.

ORDER OF COURT OF APPEALS DENYING
LEAVE TO APPEAL

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the sixteenth day of January A.D. 1974.

PRESENT, HON. CHARLES D. BREITEL,
Chief Judge, presiding.

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No. 1041

Crosby & Co. Inc., Appellant,

vs.

Compagnie Nationale Air France,
a/k/a Air France,
Respondent.

---

## ORDER OF COURT OF APPEALS DENYING LEAVE TO APPEAL

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary reproduction disbursements.

A copy

JAMES M. FLAVIN
Clerk

SEAL

THE AFFIRMED JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - -

CROSBY & COMPANY, INC.,

Plaintiff,

-against-

Index No.
0007/1969

COMPAGNIE NATIONALE AIR FRANCE
also known as AIR FRANCE,

Defendant.

- - - - - - - - - - - - - - - - - - - - - -

Defendant Compagnie Nationale Air France having moved this Court for an order pursuant to CPLR §3212 granting summary judgment in favor of defendant upon the ground that the alleged agreement between the plaintiff and defendant is not an enforceable contract because of lack of consideration, upon the ground that defendant never accepted any provision in plaintiff's offer that would render defendant liable for the damages sought herein, upon the ground that the Warsaw Convention limits defendant's liability herein and limits the time permitted for plaintiff to give written notice of its claim, and upon the

ground that defendant's tariffs and its conditions of carriage limit defendant's liability herein and limit the time permitted for plaintiff to give written notice of its claim; granting summary judgment to the defendant on its counter-claim upon the ground that the plaintiff is obligated by law to pay for the ticket of its employee; and granting defendant interest and costs; and said motion having duly come on to be heard before the Honorable Sidney H. Asch, a Justice of this Court, on the 11th day of May, 1973, at I.C. Term Part XI of this Court, and plaintiff and defendant having appeared by counsel; and the Court, after due deliberation, having duly made and entered an opinion on June 5, 1973, and having entered an order on June 5, 1973, filed in the office of the Clerk of the County of New York on June 5, 1973, wherein defendant Compagnie Nationale Air France's motion for an order granting summary judgment in its favor dismissing plaintiff's complaint and granting summary judgment to the defendant on its

THE AFFIRMED JUDGMENT

counter-claim against the plaintiff with interest and costs was in all respects granted, and said defendant's costs having been taxed in the sum of

NOW, upon motion of Haight, Gardner, Poor & Havens, One State Street Plaza, New York, New York, attorneys for defendant Compagnie Nationale Air France, it is

ADJUDGED that the plaintiff's complaint and each cause of action thereof be, and they hereby are, dismissed upon the merits; and it is

FURTHER ADJUDGED that defendant Compagnie Nationale Air France is granted summary judgment in its favor against the plaintiff on its counter-claim for $460.20 plus 6 per cent (6%) interest in the sum of $173.61 thereon from March 11, 1968; and it is

FURTHER ADJUDGED that defendant Compagnie Nationale Air France, 1350 Avenue of the Americas, New York, New York, recover from plaintiff Crosby & Company, Inc., 300 Sixth Ave. Pittsburgh,Pa. costs and disbursements as taxed in the sum of

THE AFFIRMED JUDGMENT

$257.50, making a total sum of $891.31 and that said defendant have execution therefor.

Judgment signed and entered this 20th day of June, 1973.

NORMAN GOODMAN
Clerk

FILED
June 20, 1973
N. Y. COUNTY CLERKS
OFFICE

MEMORANDUM DECISION DISMISSING COMPLAINT

SUPREME COURT : NEW YORK COUNTY

INDIVIDUAL CALENDAR PART : XI

----------X

CROSBY & COMPANY, INC.,

Plaintiff,

-against-

Index No.
0007/1969

COMPAGNIE NATIONALE AIR FRANCE,
also known as AIR FRANCE,

Defendant.

----------X

ASCH, J.:

This is an action to recover damages in the sum of $100,000 constituting alleged lost profits resulting from a breach of contract of carriage with respect to a shipment of horse meat from New York City to Toulouse, France. Plaintiff alleges that it delivered a shipment of horse meat to defendant in sound, wholesome condition for transportation by air by the defendant for delivery to one Marino Bondi in Toulouse, France, but that said shipment was not delivered in a sound and wholesome condition and, as a result, the consignee rescinded its contract for future shipments.

Plaintiff alleges that defendant was a party

to a tri-party agreement set forth in plaintiff's letter of February 1, 1968, and Air France's letter of February 16, 1968, whereby plaintiff sold to the said Marino Bondi of Toulouse, France, a quantity of horse meat to be transported by air by the defendant. Defendant contends that it was not a party to the contract of sale but acted in the capacity of common carrier of cargo by air and at all relevant times was otherwise acting only in the capacity of agent for the transmittal of funds from the consignee, Marino Bondi, to plaintiff.

Defendant received the goods in controversy from plaintiff, together with a sight draft representing the purchase price, for delivery to said Marino Bondi, in Toulouse, France. In its capacity as agent for the transmittal of funds, defendant collected the purchase price from Marino Bondi prior to delivery of the goods and transmitted it to the plaintiff. Subsequently, the entire shipment was found to be in a putrified state and was condemned by the French health authorities.

Thereafter, the consignee, Marino Bondi, rescinded the contract with plaintiff and, on or about

MEMORANDUM DECISION DISMISSING COMPLAINT

May, 1968, commenced an action in the Republic of France against defendant Air France to recover the sum of money he had theretofore paid prior to delivery of the trial shipment. On or about June 18, 1969, the Court of Commerce of Toulouse, France, postponed rendering judgment in this action. The plaintiff Bondi appealed, and on or about May 26, 1970 the Court of Appeals of Toulouse, France rendered judgment in favor of Air France on the merits.

The present action was commenced on November 1, 1968, and issue was joined by service of an answer on December 12, 1968. Pursuant to court order, defendant served an amended answer on or about December 31, 1968, and a second amended answer on or about April 30, 1969. Both amended answers included counterclaims against the plaintiff for the price of a ticket used by an employee of plaintiff who accompanied the shipment in controversy.

On or about December 27, 1968, plaintiff moved to dismiss defendant Air France's affirmative defenses. After defendant's amended answer and counter-claim were served, on or about December 31, 1968, the plaintiff amended its notice of motion and moved to dismiss the

affirmative defenses in the amended answer, which affirmative defenses are precisely the same as those included in the present second amended answer. Plaintiff's motion to dismiss the defendant's affirmative defenses was "on the ground that they respectively failed to set forth the material elements of a defense and failed to state a defense and, on their face, have no merit . . . " In its memorandum in support of its motion plaintiff argued, inter alia, that defendant's defenses based on the conditions and provisions of defendant's airway bill had no relevancy to the cause of action pleaded in the complaint since the complaint did not seek recovery of the value of the shipment or any part of the value. For the same reason, plaintiff argued that the Warsaw Convention provisions were also not applicable and that defenses based thereon were legally insufficient. On or about March 11, 1969, the Honorable Irving H. Saypol found these defenses to be legally sufficient and denied plaintiff's motion to dismiss them.

Defendant has denied and continues to deny, inter alia, that the plaintiff's description of the facts forming the bases of this action is accurate.

However, for the purposes of this motion for summary judgment, except as hereinafter noted, defendant has assumed, arguendo, the accuracy of plaintiff's factual allegations (not the legal conclusions) in paragraphs 5 through 8 of plaintiff's complaint and paragraphs 2 through 10, 12 through 17, 19, 20 and 22 of the plaintiff's bill of particulars. Even under such an assumption as to the accuracy of alleged facts, defendant is not liable to the plaintiff for the damages it claims to have sustained as a result of defendant's alleged breach of contract.

Since 1969, this significant commercial controversy has been percolating through the courts, interrupted by intermittent motions. The attorneys have been flailing at each other with such basic concepts of the law of contracts as "lack of consideration" and "lack of mutuality". But these first year law school principles are artificial constructs which were invented by the great common law judges to insure that the parties had actually made a firm bargain. In this case, these ideas conceal rather than reveal the essential questions in controversy. Did the parties herein make a firm commitment with each other? To

what did each of the parties obligate itself? When analyzed in these terms, the problems of the case are not difficult to resolve.

Air France's only legal obligation under the alleged agreement was to act as a transfer agent of funds for Marino Bondi. Plaintiff's letter of February 7, 1968, in discussing its letter of February 1st, specifically states the plaintiff's understanding that Air France was not the buyer under the agreement but was "merely acting as transmittal agents of funds for Marino Bondi". Additionally, Air France's letter response of February 16, 1968, reflects its understanding that its only responsibility was as a transmittal agent for Marino Bondi's funds. That Air France letter specifically set forth in Section 6 the extent of Air France's responsibility, as follows:

"6. Air France Responsibility

"Inasmuch as the payment of the meat will be made by Air France, it must however be understood and agreed that Air France will not assume any liability for payments in case MARINO BONDI fails to deposit with Air France the necessary funds as hereinabove provided.

At the same time Air France will not be liable in any contingencies resulting between the shipper and the consignee,

except as hereinabove indicated."

Consequently, there was no question at the time the alleged agreement was entered into that the only obligation that could have been legally imposed upon Air France under the agreement was to act as a transmittal agent for Marino Bondi's funds. Plaintiff cannot now argue that Air France is liable under the alleged agreement for the breach of an obligation which that agreement did not legally impose. Any obligation of Air France to avoid wrongful acts or omissions in transporting the trial shipment to France did not arise under the alleged agreement.

It should be pointed out that Air France would never have agreed to act as a transmittal agent for Bondi's funds and never would have transported the trial meat shipment had there been any suggestion or intimation that the plaintiff would seek to hold Air France liable for its total lost profits if the trial shipment was improperly handled by Air France. In this context, the language of the often-cited decision in Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903), is apposite:

MEMORANDUM DECISION DISMISSING COMPLAINT

> "We have to consider therefore what the plaintiff would have been entitled to recover ... , and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.
>
> "This point of view is taken by implication in the rule that 'a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract.' Grebert-Borgnis v. Nugent, 15 QBD, 85, 92; Horne v. Midland Ry. Co., L.R. 7 C.P. 583, 591; Hadley v. Baxendale, 9 Exch. 341,354; Western Union Telegraph Co. v. Hall, 124 U.S. 444, 456; Howard v.Stillwell & Bierce Manufacturing Co., 139 U.S. 199, 206; Primrose v.Western Union Telegraph Co., 154 U.S. 1, 32. The suggestion thrown out by Bramwell, B., in Gee v. Lancashire & Yorkshire Ry. Co., 6 H. & N. 211, 218, that perhaps notice after the contract was made and before breach would be enough, is not accepted by the later decisions. See further Hydraulic Engineering Co. v. McHaffie, 4 Q.B.D. 670, 674, 676. The consequences must be contemplated at the time of the making of the contract".

Accord, Armstrong Rubber Co. v. Griffith, 43 F.2d 689, 2d Cir. 1930.

Even if it is found that the plaintiff's letter "offer" of February 1st or its letter of February 7th did put Air France on notice that plaintiff would hold Air France responsible for its lost profits,

Air France's letter of February 16th certainly did not assent to such provisions or to any resulting liability of that nature. Air France's understanding of the scope of its responsibility and liability pursuant to the provisions of the alleged agreement and the arrangements and relationships described therein were specifically set forth in Section 6 of its letter of February 16, 1968.

It seems noteworthy that a portion of Section 6 reads as follows:

> "Conditions of carriage in regards to this traffic shall be those as convened on the transportation contract shown on the air waybill."

These conditions included a limitation of Air France's liability. Having thus been incorporated in the alleged agreement by express reference in Air France's February 16th letter, these conditions of carriage, including the limitation of liability, were applicable to all shipments proposed in the plaintiff's letter of February 1, 1968, and not just to the shipment eventually transported under an air waybill on which these conditions appear. Moreover, this reference makes it certain that Air France did not contemplate that the alleged agreement would render Air France

liable for the damages sought herein.

The transportation of the plaintiff's trial shipment was international transportation by air under a contract of transportation setting forth, inter alia, the place of departure as John F. Kennedy International Airport, New York, and the place of destination as Toulouse, France. This transportation constituted international air transportation within, subject to, and governed by the Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw, Poland, on October 12, 1929, and commonly known as the "Warsaw Convention". This Convention was adhered to by the Republic of France on November 15, 1932, and by the United States of America by proclamation of the President on October 29, 1934, with the advice and consent of the Senate (49 Stat. 3,000 et seq., T.S. 876).

Article 22 of the Warsaw Convention limits Air France's liability as follows:

> "(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a

> special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the actual value to the consignor at delivery.
>
> * * * *
>
> "(4) the sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

(Prior to the devaluation of May 8, 1972, the above quoted limitation amounted to $7.52 per lb. [$16.58 per kilogram]. See 37 Federal Register 11384, 11385 (June 7, 1972).

Article 26 of the Warsaw Convention limits the time for the plaintiff to give written notice of its claims against defendant. This Article provides, in pertinent part, as follows:

> "(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest

> within 14 days from the date on which the baggage of goods have been placed at his disposal.
>
> "(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.
>
> "(4) Failing complairt within the time aforesaid, no action shall lie against the carrier, save in the case of fraud on his part."

It is uncontroverted that the plaintiff did not submit any written claim to Air France for the damages alleged herein within the time period set forth in the Warsaw Convention. (In fact, though it is not relevant to the Warsaw Convention requirements, the plaintiff also did not submit any oral claim to Air France for the damages alleged herein within the time period set forth in the Warsaw Convention.)

It is well settled that, in situations such as the present one, the above-quoted provisions of the Warsaw Convention are controlling and must be enforced by the court. See, e.g., Overseas Fruit Corp. v. Varig Airlines, 11 Avi. 17,332 (Sup.Ct., N.Y. Co., 1969); Greek Fashions, Inc. v. Olympic Airways, S.A., Index No. 11818/70 (Sup.Ct., N.Y. Co., Dec. 28, 1971);

MEMORANDUM DECISION DISMISSING COMPLAINT

Brentwood Fabrics Corp. v. KLM Royal Dutch Airlines, Index No. 24036/1970 (Civ. Ct. N.Y. Co., June 25, 1970); Lady Marlene Brassiere Corp. v. Irish International Airlines, Index No. 104309/1970 (Civ.Ct., N.Y. Co., November 9, 1971).

The contract of carriage between a shipper and an airline is governed by the provisions of the Federal Aviation Act and not by the common law. Congress has, of course, pre-empted the field of aviation pursuant to its plenary interstate commerce powers, and, consequently, this Act and the tariffs filed in conformance and compliance therewith are the exclusive sources of regulations and interpretations of the contract of carriage. The common law has no application in this respect. Moreover, Congress has invested the Civil Aeronautics Board with "primary jurisdiction" over all domestic and foreign carriers of passengers and cargo by air to or from the United States.

Air France operates subject to the provisions of the Federal Aviation Act of 1958 (49 U.S.C. § 1301, et seq), which recodified the prior Civil Aeronautics Act of 1938 as amended (49 U.S.C.§ 301,

et. seq.) Pursuant to section 403(a) thereof (49 U.S.C. § 1373[2], Air France was required to and did file tariffs with the Civil Aeronautics Board containing its rules and regulations relating to the transportation of passengers and cargo.

Questions of the reasonableness of rates, regulations, and practices in air transportation regulated by the Federal government are left to the administrative agency governing the industry, in this case the Civil Aeronautics Board. Texas and Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); Vogelsang Delta Airlines, 302 F.2d 709 (2d Cir.), cert. denied, 371 U.S. 826 (1962); Herman v. Northwest Airlines, 222 F. 2d 326 (2d Cir.), cert. denied, 350 U.S. 843 (1955); Lichten v. Eastern Airlines, 189 F.2d 939 (2d Cir.1951); Civil Aeronautics Board v. Modern Air Transport, 179 F. 2d 62 (2d Cir. 1950). Section 1002 of the Federal Aviation Act (49 U.S.C. § 1482) provides a procedure for investigation of and challenges to the provisions of any airline tariff or other document approved by the Board.

A primary purpose for the Federal Aviation Act's investing the Civil Aeronautics Board with power

to review, approve, and accept a tariff containing regulations and limitations regarding air transportation is to insure uniformity of rates and services to all persons using the facilities of air carriers. Congress gave the responsibility for achieving this result to a single agency, the Civil Aeronautics Board, rather than to the numerous courts under diverse laws. Lichten v. Eastern Air Lines, supra, at 941. The Board, having been invested with power to approve and accept a tariff, has "primary jurisdiction" to determine the reasonableness thereof. A claim that a tariff is unreasonable must first be passed upon by the Board. United States v. Western Pacific R.R., 352 U.S. 59 (1956); Blair v. Delta Air Lines, Inc., 344 F.Supp. 360, 366-367 (S.D. Fla. 1972). Of course, a party claiming that a particular provision of a tariff is unreasonable must first exhaust his administrative remedies before taking recourse to the courts. Lichten v. Eastern Air Lines, supra, at 941; Vogelsang v. Delta Airlines, supra, at 713; Tishman & Lipp vs. Delta Airlines, 275 F. Supp. 371, 475 (S.D.N.Y.1967), aff'd 413 F.2d 1401 (2d Cir. 1969); Eisman v. Pan American World Airways, 336 F.Supp. 543 (E.D. Pa. 1971).

plaintiff has not sought preliminary administrative review with respect to the validity of the Air France tariffs applicable herein.

The rule is well-established that filed tariffs constitute the contract of carriage between the parties and govern the rights and liabilities arising therefrom. Blair v. Delta Airlines, Inc., 344 F. Supp. 360, 365 (S.D.Fla.1972); Tishman & Lipp, Inc. v. Delta Airlines, 275 F. Supp. 471, 481 (S.D.N.Y. 1957), aff'd, 413 F. 2d 1401 (2d Cir. 1969); Mao v. Eastern Airlines, Inc., 310 F. Supp, 844, 846 (S.D.N.Y. 1970); Progress Jewelry Co. v. Northwest Orient Airlines, Inc. , 300 F. Supp. 335 (S.D.N.Y. 1969); Beckman v. Trans World Airlines, Inc., 209 F.Supp. 851 (S.D. N.Y. 1962); Bruce Glen, Inc. v. Emery Air Freight Corp., 24 App. Div. 2d 145 (1st Dept. 1955); Tobago United Cultural Ass'n. v. Vista Travel Service Inc,, 53 Misc. 2d 1015 (Sup. Ct. App. Term,1st Dept. 1967).

The plaintiff had constructive notice of the regulations and limitations in Air France's tariff. Such constructive notice is given by filing the tariff required by the Federal Aviation Act. In Turoff v. Eastern Airlines, Inc. 129 F.Supp. 319 (N.D.III.1955),

the law was summarized as follows:

> "With respect to matters required or authorized to be included in the tariff, tariff regulations, as a matter of law, controlled carrier and passenger, without any actual notice or knowledge other than the constructive notice rendered by filing of tariffs as required by law."

See, e.g. Tannenbaum v. National Airlines, 13 Misc. 2d 450 (Sup. Ct., App. Term, 1st Dept. 1958); International Teaching Machines Corp. v. Mohawk Airlines, 9 Avi. ¶ 18,299 (Supp. Ct., N.Y. Co. 1966); Fishman v. United Airlines, Inc., 8 Avi. ¶ 17,624 (Civ.Ct. N.Y. Co. 1963); Mao v. Eastern Airlines, Inc., 310 F. Supp. 844, 846 (S.D.N.Y. 1970).

Air France's Cargo Rules Tariff No. CR-2, C.A.B. No. 17, was filed pursuant to the Federal Aviation Act with the Civil Aeronautics Board and was in effect on March 12, 1968. Rule 2, "Applicability of Tariff" provided, in pertinent part, as follows:

> "(A) General: This tariff shall apply to carriage of cargo, including all services incidental thereto, performed by carrier . . . . .
>
> * * * *
>
> "(D) Effective Rules: All carriage of cargo governed by this tariff shall

> be subject to the rules, regulations and conditions of carriage in effect on the date that the transportation begins."

The conditions of carriage in effect on [sic] March 12, 1973 that are made binding on each contract of carriage are those that are set forth on each air waybill. As pointed out above, since they are made binding by the tariffs, the plaintiff had constructive notice of these conditions as a matter of law. (Also, these conditions were specifically referred to by Air France in its letter of February 16, 1968.)

These conditions contain two provisions, a limit of liability and a time limit for claim, that dispose of the plaintiff's action herein. Both of these provisions are set forth hereinbelow (page 15). This may be the proper place, however, to point that these limits apply to all claims, i.e., the plaintiff cannot escape these limitations by suggesting that its claim does not fall into the category covered by Air France's tariff. In Bruce Glen, Inc. v. Emery Air Freight Corp., 24 App. Div. 2d 145 (1st Dept. 1965), plaintiff sought consequential damages, including the loss of commissions on sales because of delayed de-

livery of goods shipped. The court enforced the tariff limitation and declined to award the plaintiff any amount in excess of the declared value for carriage.

In Blair v. Delta Airlines, Inc., 344 F. Supp. 360 (S.D. Fla. 1972), the plaintiff argued that its claims for punitive damages and for tort damages of mental pain and anguish arising from the handling of his wife's remains by the carrier did not fall into the category covered by the defendant airline's tariff. The court found that the defendant's tariff provisions covered all aspects of the case and limited the defendant's total liability to the plaintiff, no matter what the cause of action. This conclusion was based on limitations of liability similar to those in Air France's conditions of carriage.

The most recent decision on this issue is Gellert v. United Airlines, Inc., ___F.2d ____, 12 Avi. 17,762 (10th Cir. 1973). There too, the plaintiff alleged that consequential damages were not limited by tariff limitations of liability similar to those of Air France herein. The Court held that the limitation of liability in the tariff rules precluded any recovery for consequential damages for business losses, includ-

ing loss of profits, in excess of the amount permitted in the limitation of liability.

The Gellert decision was based on the per curiam decision of the United States Supreme Court in Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936). The Supreme Court ruled that tariff limitations of liability applied to a suit for damages for the interruption of plaintiff's business caused by a delay alleged to be due to the carrier's negligence. Underlying this decision was the principal [sic]

> "that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risks and responsibility assumed . . . . The broad purpose of the Federal act is to compel the establishment of reasonable rates and to provide for their uniform application. Special contracts are not permitted to give any advantage to a particular shipper . . . . The liability in this instance is thus governed by the provisions of the applicable tariff and no recovery could be had in excess of the amount permitted by its terms."

299 U.S., at 29-30. Accord, American Synthetic Rubber Co. v. Louisville & Nashville R.Co., 422 F 2d 462 (6th Cir. 1970).

Therefore, the Air France tariff clearly limits Air France's liability for the plaintiff's claims herein

and also limited the time permitted for the plaintiff to give written notice of its claims.

The following statement was set forth on page 3 of Air France's letter of February 16, 1968:

> "Conditions of carriage in regards to this traffic shall be those as convened on the transportation contract shown on the air waybill."

Section 4 of the conditions of carriage of the standard air waybill reflects the limitations of the Warsaw Convention:

> "Except as the Convention or other applicable law may otherwise require: (a) Carrier is not liable to the shipper or to any other person for any damage, delay or loss of whatsoever nature (hereinafter collectively referred to as 'damage') arising out of or in connection with the carriage of goods, unless such damage is proved to have been caused by the negligence or willful fault of Carrier and there has been no contributory negligence of the shipper, consignee or other claimant' (b) Carrier is not liable for any damage directly or indirectly arising out of the compliance with laws, government regulations, orders or requirements or from any cause beyond carrier's control; (c) the charges for carriage having been based upon the value declared by the shipper, it is agreed that any liability shall in no event exceed the shipper's declared value for carriage stated on the fact hereof, and in the absence of such declaration by shipper, liability of Carrier shall not exceed 250

> such French gold francs, or their equivalent per kilogram of goods destroyed, lost, damaged or delayed; all claims shall be subject to proof of value . . . . "

Section 10(a) of the Conditions of Carriage also reflects the limitation of the Warsaw Convention on the time for the plaintiff to make written claim upon Air France:

> "[10)(a) No action shall be maintained in the case of damage to goods unless a written notice, sufficiently describing the goods concerned, the approximate date of the damage, and the details of the claim, is presented to an office of Carrier within 7 days from the date of receipt thereof, in the case of delay unless presented within 14 days from the date the goods are placed at the disposal of the person entitled to delivery, and in the case of loss (including non-delivery) unless presented within 120 days from the date of issue of the air waybill.

The above-quoted limitations are conditions of carriage specifically incorporated in the alleged agreement by express reference in Air France's letter of February 16, 1968, as well as in the applicable tariff. As such, these conditions were applicable to all shipments proposed in the plaintiff's letter offer of February 1, 1968; and not just to the shipment eventually transported under the air waybill on which these conditions appear. In any event, these

limitations appear in the conditions of contract on air waybill No. 057-2-946-464, which was issued to cover the trial shipment, and, these limitations apply to all claims for damages, consequential or otherwise, which arise in any way out of the trial shipment.

A relatively minor controversy relates to the claim by Air France that plaintiff Crosby is obliged by law to pay for the ticket of its employee, a passenger who accompanied the trial shipment.

On or about the 11th day of March, 1968, at the request of the plaintiff, Air France issued an airline ticket to David Heckelaar, an employee of the plaintiff, covering round-trip transportation between New York and Toulouse, France, via Paris. This employee used the round-trip ticket to conduct plaintiff's business in connection with the trial shipment of meat.

Air France contends that the plaintiff agreed to pay the sum of $460.20 for the ticket within a reasonable time after its issue, but no part of this sum was ever paid by plaintiff to the defendant, although due demand was made.

In any event, the plaintiff is obligated by law to pay Air France $460.20. Section 403(a) of the Federal Aviation Act of 1958 (49 U.S.C. Section 1373(b) provides, in pertinent part, as follows:

> "No air carrier or foreign air carrier shall charge or demand or collect or receive . . . less or different compensation for air transportation, or for any service in connection therewith than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein.

In United States v. Associated Air Transport, 275 F.2d 827 (5th Cir. 1960), the carrier had brought an action against the Government to recover for air transportation furnished, but the Government claimed that the carrier, through a bid, had agreed upon a rate less than the rate charged under the applicable tariff. The court's discussion of this issue is appropriate here:

> "The tariffs are both conclusive and exclusive; they may not be added to

> through reference to outside contracts or agreements or understandings or promises.
>
> "As a natural corollary to such a dynamic policy prohibiting the possibility or temptation to preferential discrimination . . . . is the equally uncontradicted legal proposition that estoppel cannot be invoked against a common carrier to avoid a tariff provision. 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay.' Kansas City Southern Ry. Co. v. Carl, 1913, 227 U.S. 639, 653, 33 S.Ct. 391, 395, 57 L.Ed. 683, 688. It is clear that no 'act or omission of the carrier' can 'estop or preclude it from enforcing payment of the full amount' of the tariff charges, Louisville & N.R.Co. v. Central Iron & Coal Co., 1924, 265 U.S. 59, 65, 44 S.Ct. 441, 442, 68 L.Ed. 900, 902. And 'equitable considerations may not serve to justify failure of carrier to collect, or retention by shipper of, any part of lawful tariff charges', Baldwin v. Scott County Milling Co., 1939, 307 U.S. 478, 485, 59 S.Ct. 943, 948, 83 L. Ed. 1409, 1914. Pittsburgh, C., C.& St. L. Ry. Co. v. Fink, 1919, 250 U.S. 577, 40 S. Ct. 27, 63 L. Ed. 1151.

275 F.2d at 833-834. Accord, Trinidad and Tobago United Cultural Ass'n., Inc. vs. Vista Travel Service, 53 Misc. 2d 1015 (Sup.Ct., App.T., 1st Dept. 1967). See Bartlett-Collins Co. v. Surinam Navigation Co., 381 F. 2d 546, 549 (10th Cir.1967).

MEMORANDUM DECISION DISMISSING COMPLAINT

In items 23 and 24 of its bill of particulars plaintiff's only excuse for not paying for the ticket is the allegation that defendant Air France had agreed that no charge would be made for the transportation of plaintiff's employee. As the above discussion indicates, even if that unsubstantiated contention were correct, the law does not excuse it from paying Air France the cost of the ticket.

On defendant's motion for summary judgment, the complaint should be dismissed with costs and judgment directed in favor of defendant on its counter-claim with interest and costs.

Dated: June 5, 1973.

S.H.A.

J. S. C.

MEMORANDUM OF SAYPOL, J. DENYING MOTION TO DISMISS DEFENSES

SAME TITLE

SAYPOL, J.:

The plaintiff moves for dismissal of all of the defenses contained in the answer of the defendant. The substance of the complaint is that the plaintiff as seller, a third party as buyer, and the defendant as carrier, engaged in a contract for the trans-shipment of horsemeat.

The complaint sounds in contract, which the plaintiff characterizes as tri-partite, and it charges that because of the defendant's breach of contract in shipment of the first and trial delivery, the buyer cancelled the contract and the plaintiff sustained loss of the prospective profit to accrue from performance of the entire contract.

By incorporation of the contract as part of the complaint, the provisions of the former control over any indicated conflicting allegation in the complaint. Patently, by the assertion of the defenses, the defendant contends that there are such variances

between complaint and contract.

The first defense is a conclusory statement that the complaint is insufficient. That is not a defense.

Plaintiff challenges the other defenses pleaded on the grounds that they fail to set forth the material elements of a defense; that they are abstract and general; that they do not relate to the substance of the complaint; and that they have no merit.

Plaintiff submits no affidavit or other evidentiary facts in support of the motion other than a memorandum and a letter dated March 26, 1968, from defendant to plaintiff, and a check for an amount equal to the declared value of the shipment in controversy, as set forth in the Air Waybill constituting the contract of carriage and other incidental transportation expenses, and advising of the confiscation of the shipment by the French authorities.

Each of the challenged defenses, except the first, is legally sufficient. Defendant has made a proper showing to sustain them against attack.

The challenged defenses identify the issues with sufficient precision to enable the Court to control the

case and the plaintiff to prepare. Any amplification deemed necessary can be by a bill of particulars or disclosure. The sufficiency of the defenses is not to be controlled by plaintiff's version of its complaint.

> "If there is any doubt as to the availability and applicability of the defense or a mere belief that the proof might fall short of the defense it should not be stricken." (Krantz v. Garmise, 13 A D 2d 426, 429)."

The motion is granted dismissing the first defense, and it is otherwise denied.

Dated, March 11, 1969.

S

J. S. C.

FILED
March 11, 1969
Co. Clerk's Office
New York

MEMORANDUM OF GELLER, J. ENJOINING DEFENDANT FROM IMPLEADING PLAINTIFF IN BONDI ACTION IN FRANCE AGAINST AIR FRANCE

CROSBY & CO., INC., v. COMPAGNIE NATIONALE AIR FRANCE. This is a motion by plaintiff, a Pennsylvania corporation, to enjoin during the pendency of this action the defendant, Air France, doing business and maintaining offices in the City and State of New York, from proceeding, in effect, with a third-party action in France on a matter related to the issues in this action.

Plaintiff is suing to recover alleged loss of profits in the sum of $100,000 as a result of a claimed breach of contract of carriage by Air France with respect to a shipment of horsemeat delivered by plaintiff to Air France at Kennedy Airport, in the City of New York, for delivery to one Marino Bondi in Toulouse, France. The agreement was for sale by plaintiff to Bondi of two million pounds of horsemeat, to be shipped in certain weekly quantities through Air France, with payments to be made against the issued air waybills by Air France, which agreed to obtain advance funds for such purpose from Bondi. This agreement was conditioned upon Bondi's satisfaction with the quality of the meat on a first trial shipment of 20,000 pounds. "Air France, New York,

MEMORANDUM OF GELLER, J.

New York," through its New York Cargo District Manager, as well as Bondi, signed an acceptance of the contract, as amended with specified conditions in a writing signed and transmitted by said district manager.

The trial shipment, delivered by plaintiff to Air France at Kennedy Airport on March 11, 1968, was on arrival at Toulouse, France, found to be unfit for consumption and condemned by the authorities. On March 26, 1968, Air France paid plaintiff by check in the amount of $5,687.97 for that shipment with funds previously advanced by Bondi. Bondi notified plaintiff that he rescinded the contract and in May, 1968, brought action in a Toulouse court against Air France for money had and received to recover the moneys advanced by him.

Plaintiff through its attorney notified Air France at its New York office by letter dated Aug. 13, 1968, of its claim against Air France for $100,000 damages for breach of said agreement arising from its alleged improper handling of the trial shipment. This action against Air France was thereafter commenced by service of summons and complaint on Nov. 1, 1968. Air France served its answer on Dec. 12, 1968. On or about Jan. 17,

MEMORANDUM OF GELLER, J.

1969, plaintiff received papers in an envelope postmarked Toulouse, France, constituting a summons and notice dated Dec. 9, 1968, to appear in that court to defend against a claim-over by Air France for judgment-over against a claim-over by Air France for judgment-over against plaintiff in the event of a recovery in that action by Bondi. Plaintiff thereupon brought on this motion to enjoin Air France from proceeding with that claim-over during the pendency of this action.

It is clear that the same issue is to be determined in the claim-over and in this action--whether plaintiff delivered to Air France at Kennedy Airport sound and wholesome meat in accordance with the agreement. The witnesses and the evidence with respect to that issue are here. Plaintiff is not doing business and has no place of business or contacts in France. This agreement and the trial shipment were handled by the New York office of Air France, which is subject to the jurisdiction of this court by virtue of its doing business in this state and its having been properly served and appearing in this action. While Air France

did not include in its answer a counterclaim for the $5,687.97 paid by it to plaintiff, but did assert it in its claim-over in the French action, obviously it could so counterclaim in this action.

The evident purpose of Air France is to have the French court determine the issue of responsibility as between it and the plaintiff, which is the subject of this action, and obtain a judgment on its claim-over which could be asserted by way of res judicata or collateral estoppel in this action. Judged by our jurisdictional standards, such a judgment based on the mailed process, if plaintiff defaulted, would have no legal effect. But plaintiff is faced with the problem as to whether, under the laws of France, by virtue of the nature of this transaction, jurisdiction under its "long arm" statute or interpretation might be held to be valid and, if so, whether some legal effect might then be accorded to it.

Manifestly it is unfair to permit plaintiff to be placed in such a predicament. It is quite clear that the interests of justice and equity call for the exercise by the court of its discretion to enjoin Air

MEMORANDUM OF GELLER, J.

France as a party within its jurisdiction from proceeding with its claim-over so that the identical issue between it and plaintiff may be determined in this action previously commenced in a jurisdiction where issue has been joined between them and where all the evidence is available.

Air France has raised the procedural objection that under CPLR 6301 a temporary injunction is authorized only if the action is one for a permanent injunction or if the action involves a specific subject matter or res, "the subject of the action," with respect to which plaintiff's rights are claimed to be violated or threatened. An action solely for money damages does not as such qualify under this rule. However, aggrieved parties have adopted the device of bringing an independent action for a permanent injunction restraining the maintenance of the foreign suit and simultaneously moving in that action for a temporary injunction. Moreover, where the defense of prior action pending is before a court, it has the power and discretion under CPLR 3211 (a)(4) to enjoin the prosecution of the subsequent action. Whether the court views this matter on the

assumption of an action for a permanent injunction or analagously with a defense of prior action pending, the procedural objection is overruled.

Settle order.

CONTRACT SUED ON

(CROSBY LETTERHEAD)

February 1, 1968

Air France, Cargo Division
1350 Avenue of the Americas
New York, New York 10019

Attention: Mr. Juan Anziani, Representative

Gentlemen:

We offer for sale to - Marino Bondi, 17 Chemin de la Glaciere, Toulouse, France:

Two million pounds of United States Department of Agriculture Inspected and Passed Horse Meat, produced in a United States Department of Agriculture Inspected Plant, for the period commencing on or about March 1, 1968 and ending August 31, 1968; to be delivered weekly in quantities of not less than 80,000 pounds per week, in units (one unit shall consist of two (2) forequarters and two (2) hindquarters) at a price of 26-1/2 cents per pound. United States Department of Agriculture Inspected and Passed livers, hearts, tongues and jowls, to be separately packed, shall be delivered without cost.

CONTRACT SUED ON (Continued)

All quotations are in United States currency, f.o.b. John F. Kennedy Airport, New York, New York, U.S.A., with title to pass on delivery to motor carrier.

Payment shall be made by Air France, New York, New York, U.S.A., upon presentation of a draft accompanied by the original executed shipper's copy of the Bill of Lading issued by the carrier transporting each shipment.

The meat to be delivered to you shall be prime grade, dressed, packed and shipped in the following manner:

A. Each carcass shall be cut up into quarters:

1. The forequarters (to include the neck) shall contain nine (9) ribs and the forelegs.

2. The hindquarters shall contain five (5) ribs and include the hind legs.

3. All quarters shall be wrapped in paper and cloth shroud, and shall be frozen to a temperature of 14° Fahrenheit

CONTRACT SUED ON (continued)

at plant. Each carcass shall be numbered as indicated by purchaser.

4. Cuts shall be as set forth in the attached diagram, which shall be signed by the parties to indicate agreement, and made a part of this proposal.

B. Livers, hearts, tongues and jowls shall be packed in a cellophane liner and boxed and tagged as prescribed by United States Department of Agriculture. Any of the above that may be rejected by the United States Department of Agriculture will not be included in the unit, and Crosby & Company, Inc. shall not be held accountable for same.

This offer is subject to acceptance within ten (10) days from this date. The availability of the meat described above is subject to prior sale and contingencies beyond our control.

If you desire to purchase this meat on the terms and conditions herein and above set forth, your execution of a copy of this letter at the place

CONTRACT SUED ON (continued)

provided below shall constitute an irrevocable offer by you to purchase this meat. Upon receipt from you of your duly executed offer, we will advise you by cable within five (5) days of its receipt by us at our Pittsburgh, Pennsylvania, U.S.A. office, confirmation of its acceptance.

See Reverse side of page for amendment.

Very truly yours,

CROSBY & COMPANY, INC.

By L. L. CROSBY
L. L. Crosby, President

STATE OF FLORIDA )
COUNTY OF DADE )ss

Before me, L.L.Crosby being duly sworn states that he is the President of Crosby & Company,Inc., and is duly authorized to execute this proposal.

Witness my hand and official seal, this 1st day of February, 1968.

(Signature)
Notary Public,State of Florida

Notary Public, State of Florida at Large - My commission expires Jan.1, 1971

CONTRACT SUED ON (Continued)

The above terms and conditions are accepted:

MARINO BONDI _____ Dated: 1968.
MARINO BONDI, (_____)
Title

17 Chemin de la Glaciere,
Toulouse, France.

ACCEPTED:

AIR FRANCE, NEW YORK, NEW YORK

BY J. R. Saccone Title: Cargo District Manager

As per letter NYC FF dated Feb 16th
Feb 20/68.

AMENDMENT No 1

Crosby and Co Agrees to Furnish one trial shipment the first week of March 1968 of 20000 LBS. This contract will be void if quality of meat on trial shipment is not satisfactory to Marino Bondi.

AMENDMENT No 2

Meat Shall be frozen in winter at a temperature $0^{o}C$ TO $+ 2^{o}C$ in the summer $+ 2^{o}C$ TO $4^{o}C$

MARINO BONDI

CONTRACT SUED ON (Continued)

(AIR FRANCE LETTERHEAD)

February 16, 1968

Mr. L.L. Crosby
President
Crosby & Company, Inc.
300 Sixty Avenue
Pittsburgh, PA. 15222

DearMr. Crosby:

Please find enclosed contract signed by Mr. Marino Bondi in Toulouse accepting your offer with the following two amendments:

1. CROSBY & COMPANY agrees to furnish one trial shipment of 20,000 lbs. the first week of March 1968. The contract will be void if quality of meat on trial shipment is not satisfactory to Marino Bondi.

2. Meat shall be frozen in winter at a temperature $0^{o}$ C to $2^{o}$ C, and in the summer $+2^{o}$ C to $4^{o}$ C.

These two amendments appear on back page of contract and the same is signed by Mr. Marino Bondi.

CONTRACT SUED ON (Continued)

At the same time, we would like to point out the following:

1. PACKING

In order to assure good arrival of the meat in Toulouse, it will be required to have each quarter packed in:

a. Cheese cloth (stockinet)

b. Paper

c. Polyethelene bag wrapped on top to protect any leaking.

2. TEMPERATURE

According to Mr. M. Bondi, amendment on verso of contract, the temperature on arrival of 0° C to plus 2°.C during the winter and of plus 2° C to plus 4° C during the summer will be required. Inasmuch as we cannot judge this requirement, we wish to point out that the lowest temperature in the cabin compartment of the all cargo aircraft is approximately 45F.

3. FORWARDING

We have proposed the hereunder all cargo flight schedules:

CONTRACT SUED ON (Continued)

| | | | | | |
|---|---|---|---|---|---|
| TUE | Flt. 054 | departing at | | 11:35 AM | 30,000L |
| SAT | " 053 | " | " | 11:35 AM | 30,000L |
| SUN | " 049 | " | " | 2:00 PM | 20,000L |
| | | | | TOTAL: | 80,000L |

In order that we may be allowed to assure forwarding on the above-indicated flights, we will require delivery at our JFK International Airport Cargo Building #86 not later than 10 p.m. the previous days, that is: Monday, Friday and Saturday.

The delivery time is now under further study and we will confirm if same can be accomplished with less advance time.

4. DOCUMENTATION

The air waybill will be issued at our JFK office but, will require the following documentation to accompany each shipment:

a. Shippers' letter of instructions (copy enclosed)

b. Export declaration filled.

c. Two copies of commercial invoices.

d. Certificate of origin.

e. Certificate of health

CONTRACT SUED ON (Continued)

5. PAYMENT OF MERCHANDISE

Subject to reservations as contained in paragraph #6 below, it is agreed Air France will pay CROSBY & COMPANY the value of the meat at the agreed cost indicated on the contract at $.265 per pound. The following procedure will be applicable:

a. Payments will be made against the issued air waybill and same will be mailed to your address.

b. Payments will be made against weight shown on air waybills.

c. Air France will see to have advance funds in its possession at Toulouse for at least two weeks shipments (approximately 160,000 lbs. countervalue of horse meat at convened price).

6. AIR FRANCE RESPONSIBILITY

In as much as the payment of the meat will be made by Air France, it must however be understood and agreed that Air France will not

CONTRACT SUED ON (Continued)

assume any liability for payments in case MARINO BONDI fails to deposit with Air France the necessary funds as hereinabove provided.

At the same time, Air France will not be liable in any contingencies resulting between the shipper and consignee, except as hereinabove indicated.

Conditions of carriage in regards to this traffic shall be those as convened on the transportation contract shown on the air waybill.

Trusting the above outline will meet with your concurrence, which you will kindly indicate by signing and returning to us the attached copy of this letter.

Assuring you our fullest cooperation, we remain

Very truly yours,

Joseph R. Saccone
Joseph R. Saccone
New York Cargo District Manager

ACCEPTED:
CROSBY & COMPANY
BY: L.L. Crosby

LETTER CROSBY TO AIR FRANCE, 2/7/68 NOT REFERRED TO IN CONTRACT

(CROSBY LETTERHEAD)

February 7, 1968

Air France,
Cargo Division
1350 Avenue of the Americas
New York, New York 10019

Attention: Mr. J. R. Saccone.
New York Cargo District Manager

Dear Mr. Saccone:

Pursuant to our telephone conversation this day relative to the proposal submitted to Air France for Marino Bondi, Toulouse, France, we will modify said proposal by agreeing to deliver three (3) initial shipments of approximately 50,000 pounds each, to be considered trial shipments, after which the balance of the order will remain at two million pounds, provided the trial shipments are satisfactory. All other terms and conditions will remain in accordance with our offer dated February 1, 1968.

The word "prime" as set forth in our offer should read "good quality."

We understand that Air France are not

Letter Crosby to Air France, 2/7/68
Not referred to in contract

the buyers and are merely acting as transmittal agents of funds for Marino Bondi. It is our understanding that Marino Bondi will deposit with Air France sufficient funds to cover at least two weeks delivery, which funds shall be on deposit with Air France for our account and available to us until the final delivery of the meat covered by our agreement with Marino Bondi, and that Air France will assume the responsibility for paying our drafts promptly upon presentation.

Very truly yours,

CROSBY & COMPANY, INC.

L. L. Crosby,
President

LLC/vc

**LETTER CROSBY TO AIR FRANCE, 2/14/68**
**NOT REFERRED TO IN CONTRACT**

**(CROSBY LETTERHEAD)**

Air France
Cargo Division
1350 Avenue of the Americas
New York, New York 10019

Attention: Mr. J. R. Saccone,
New York Cargo District Manager

Dear Mr. Saccone:

We wish to confirm our further understanding after our letter to you dated February 7, 1968 to the effect that the trial shipment to Marino Bondi, Toulouse, France, will be one (1) shipment of approximately 20,000 pounds and if this shipment meets with Marino Bondi's approval, then the order for two million pounds as set forth in our proposal of February 1, 1968, becomes effective.

All other terms and conditions as set forth in our proposal of February 1, 1968 and our letter to you of February 7, 1968, remains the same.

We have not received your confirmation

Letter Crosby to Air France, 2/14/68
not referred to in contract

and the signed contract from Marino Bondi.
We should have this in our possession immed-
iately, in order to proceed with any deliver-
ies.

Very truly yours,

CROSBY & COMPANY, INC.

L. L. Crosby
President

LLC/vc

AIR WAYBILL
(AIR CONSIGNMENT NOTE)

74a

# AIR FRANCE

COMPAGNIE NATIONALE DE TRANSPORTS AERIENS
2, Rue Marbeuf, PARIS, FRANCE

AIR WAYBILL
NOT NEGOTIABLE

No. 057–2 946 464

MEMBER OF IATA AND ATAF

"If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers in respect of loss or of damage to cargo".

DESTINATION (AIRPORT OF): ~~TOULOUSE~~ FRANCE

CONSIGNED TO: MARINO BONDI | STREET ADDRESS: 17 CHEMIN DE LA GLACIERE | CITY AND COUNTRY: TEL 62.48.05 ~~TOULOUSE~~ FRANCE

ALSO NOTIFY

NYC-TLS

| NO. OF PACKAGES | METHOD OF PACKING | NATURE AND QUANTITY OF GOODS | MARKS AND NUMBERS | DIMENSIONS OR VOLUME | GROSS WEIGHT (Specify Kilos or Lbs.) |
|---|---|---|---|---|---|
| 136 | ASADRSS | 136 FRESH KILLED (FROZEN) HORSE MEAT QUARTERS IN KRAFT PAPER BAGS | ~~20x883~~ | | 20,831 |
| 34 | BOXES | Carcass only Packed | x883 | | 688 |
| 170 | total | | total | total | ~~21,519~~ |

THESE COMMODITIES LICENSED BY U. S. FOR ULTIMATE DESTINATION: FRANCE

DIVERSION CONTRARY TO U. S. LAW PROHIBITED 21795 C

DOCUMENTS TO ACCOMPANY AIR WAYBILL

| SHIPPER'S DECLARED VALUE (specify currency) For Customs | For Carriage |
|---|---|
| $ 5,520.21 | $ 5,520.21 |

METHOD OF ROUTING AND CHARGES—Agreed stopping places are those places (other than the places of departure and destination) shown under Air Carriage, and/or those places shown in carrier's timetables as scheduled stopping places for the route. SEE CONDITIONS ON REVERSE HEREOF.

SHIPPER MUST INSERT ITEM NUMBER CHARGEABLE TO SELF.

## AIR CARRIAGE

Departure (Airport of): NEW YORK JFK (Address of First carrier)

| | | Chargeable Weight (Specify Kgs. or Lbs.) | Rate Classification | Rates | PREPAID CASH/CREDIT (Cross Out One) | CHARGEABLE TO CONSIGNEE Currency | Amounts in currencies as charged | Amounts in currencies at destination |
|---|---|---|---|---|---|---|---|---|
| 1. To TLS | First Carrier A.F | 21,519 | | 0602 .19 | | usd | ~~$4033.01~~ 4141.05 | 9 |
| 2. To | Carrier | 21795 | | | | | | |
| 3. To | Carrier | | | | | | | |
| 3a. To | Carrier | | | | | | | |
| 4. Valuation Charge from | to | | | | | | | |
| 5. Valuation Charge from | to | | | | | | | |
| 6. INSURANCE | AMOUNT REQUESTED (SPECIFY CURRENCY) → | | | | | | | |

IF SHIPPER REQUESTS INSURANCE, IN ACCORDANCE WITH CONDITIONS STATED ON REVERSE HEREOF, INDICATE AMOUNT OF INSURANCE IN FIGURES IN SPACE PROVIDED IN 6 ABOVE.

Other Charges (specify)

7. at Origin
8.
9.
10.
11. in Transit
12. at Destination
13.
14.
15.
15a.
15b.
15c.
16. C.O.D. Fee
THIS LINE RESERVED FOR COPIES 1, 2 & 4
17. Shipper's C.O.D.

SHIPPER'S C.O.D. IN WORDS

Totals 4141.05 (3)

The Shipper certifies that the particulars on the face hereof are correct and agrees to the CONDITIONS ON THE REVERSE HEREOF.

Carrier certifies above-described goods were received for carriage SUBJECT TO THE CONDITIONS ON THE REVERSE HEREOF, the goods then being in apparent good order and condition except as noted hereon.

NAME OF SHIPPER: CROSBY & CO INC
ADDRESS: 300-6th ave PITTSBURGH PENN
SIGNATURE OF SHIPPER
BY BROKER/AGENT

EXECUTED ON: MARCH 12, 1968 AT JFK INTL

NAME AND ADDRESS OF ISSUING CARRIER'S AGENT: AIR FRANCE BOB AGNEW AGENT A.F.

SIGNATURE OF ISSUING CARRIER'S AGENT

3399725

COPIES 1, 2, AND 3 OF THIS AIR WAYBILL ARE ORIGINALS AND HAVE THE SAME VALIDITY

ORIGINAL 1
(For Issuing Carrier)

(PRINTED IN USA)

TIMBRE EN COMPTE AVEC LE TRESOR FRANCAIS (Decisions des 30-10-1969 et 12-11-1969)

In Support of Motion

Plaintiff's Exhibit "B" MARINE PAPER EX B

75a

## CONDITIONS OF CONTRACT

PLF'S EXH 2 FOR Ib 6/18/19 TJL

## CONDITIONS DU CONTRAT DE TRANSPORT

In Support of Motion

1° As used in this contract, "Convention" means the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929, or that Convention as amended by the Hague Protocol, 1955 whichever may be applicable to carriage hereunder. "Air waybill" is equivalent to "air consignment note" shipper is equivalent to "consignor", "carriage" is equivalent "to transportation" and "Carrier" includes the air carrier issuing this air waybill and all air carriers that carry the goods hereunder or perform any other services related to such air carriage. For the purposes of the exemption from and limitation of liability provisions set forth or referred to herein, "Carrier" includes agents, servants, or subcontractors of any such air carrier. Carriage to be performed hereunder by several successive carriers is regarded as a single operation.

(1) (a) Carriage hereunder is subject to the rules relating to liability established by the Convention, unless such carriage is not "international carriage" as defined by the Convention. (See Carrier's tariffs for such definition.)

(b) To the extent not in conflict with the foregoing, carriage hereunder and other services performed by each Carrier are subject to (i) applicable laws including national laws implementing the Convention), government regulations, orders, and requirements, (ii) provisions herein set forth, and (iii) applicable tariffs, rules, regulations and timetables (but not the times of departure and arrival therein) of such carrier, which are made part hereof and which may be inspected at any of its offices and at airports from which it operates regular services.

(c) For the purposes of the Convention, the agreed stopping places (which may be altered by Carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth on the face hereof or shown in Carrier's timetables as scheduled stopping places for the route.

(d) In the case of carriage subject to the Convention, the shipper acknowledges that he has been given an opportunity to make a special declaration of the value of the goods at delivery and that the sum entered on the face of the air waybill as "Shipper's/Consignor's Declared Value—For Carriage", if in excess of $50 French gold francs (consisting of 65-1/2 milligrams of gold of the fineness of 900 thousandths) or their equivalent per kilogram, constitutes such special declaration of value.

(2) Insofar as any provision contained or referred to in this air waybill may be contrary to mandatory law, government regulations, orders, or requirements, such provision shall remain applicable to the extent that it is not overridden thereby. The invalidity of any provision shall not affect any other part hereof.

(3) (a) Except as the Convention or other applicable law may otherwise require: (i) Carrier is not liable to the shipper or to any other person for any damage, delay or loss of whatsoever nature (hereinafter collectively referred to as "damage") arising out of or in connection with the carriage of the goods, unless such damage is proved to have been caused by the negligence or wilful fault of Carrier and which has been no contributory negligence of the shipper, consignee or other claimant; (b) Carrier is not liable for any damage directly or indirectly arising out of compliance with laws, government regulations, orders or requirements or from any cause beyond Carrier's control; (c) the charges for carriage having been based upon the value declared by the shipper, it is agreed that any liability shall in no event exceed the shipper's declared value for carriage stated on the face hereof, and in the absence of such declaration by shipper, liability of Carrier shall not exceed $20 such French gold francs, or their equivalent per kilogram of goods destroyed, lost, damaged or delayed; all claims shall be subject to proof of value; (d) a carrier issuing an air waybill for carriage exclusively over the lines of others does so only as a sales agent.

(b) It is agreed that no time is fixed for the completion of carriage hereunder and that Carrier may without notice substitute alternate carriers or aircraft. Carrier assumes no obligation to carry the goods by any specified aircraft or over any particular route or routes or to make connection at any point according to any particular schedule, and Carrier is hereby authorized to select, or deviate from, the route or routes of shipment, notwithstanding that the same may be stated on the face hereof. The Shipper guarantees payment of all charges and advances.

(4) The goods, or packages said to contain the goods, described on the face hereof, are accepted for carriage, from their receipt at Carrier's terminal or airport office at the place of departure to the airport at the place of destination. If so specifically agreed, the goods, or packages said to contain the goods, described on the face hereof, are also accepted for forwarding to the airport of departure and for reforwarding beyond the airport of destination. If such forwarding or reforwarding is by carriage operated by Carrier, such carriage shall be upon the same terms as to liability as set forth in Paragraphs 2 and 4 hereof. In any other event, the issuing carrier and last carrier, respectively, in forwarding or reforwarding the goods, shall do so only as agents of the shipper, owner, or consignee, as the case may be, and shall not be liable for any damage arising out of such additional carriage, unless proved to have been caused by its own negligence or wilful fault. The shipper, owner and consignee hereby authorize such carriers to do all things deemed advisable to effect such forwarding or reforwarding, including, but without limitation, selection of the means of forwarding or reforwarding and the routes thereof (unless these have been herein specified by the shipper), execution and acceptance of documents of carriage (which may include provisions exempting or limiting liability) and consigning of goods with no declaration of value, notwithstanding any declaration of value in this air waybill.

(5) Carrier is authorized (but shall be under no obligation) to advance any duties, taxes or charges and to make any disbursements with respect to the goods, and the shipper, owner and consignee shall be jointly and severally liable for the reimbursement thereof. No Carrier shall be under obligation to incur any expense or to make any advance in connection with the forwarding or reforwarding of the goods except against repayment by the shipper. If it is necessary to make customs entry of the goods at any place, the goods shall be deemed to be consigned at such place to the person named on the face hereof as customs consignee or, if no such person be named, to the carrier carrying the goods to such place or to such customs consignee, if any, as such carrier may designate.

(6) At the request of the shipper, and if the appropriate premium is paid and the fact recorded on the face hereof, the goods covered by this air waybill are insured on behalf of the shipper under an open policy for the amount requested by the shipper as set out on the face hereof (recovery being limited to the actual loss or damage not exceeding the insured value) against all risks of physical loss or damage from any external cause whatsoever, except those arising directly or indirectly from war risks, strikes, riots, hostilities, legal seizure or delay or inherent vice and subject to the terms and conditions of such open policy which is available for inspection by the shipper. Claims under such policy must be reported immediately to an office of Carrier.

(7) Except as otherwise specifically provided in this contract, delivery of the goods will be made only to the consignee named on the face hereof, unless such consignee is one of the Carriers participating in the carriage, in which event delivery shall be made to the person indicated on the face hereof as the person to be notified. Notice of arrival of the goods will, in the absence of other instructions, be sent to the Consignee, or the person to be notified, by ordinary methods. Carrier is not liable for non-receipt or delay in receipt of such notice.

(8) (a) No action shall be maintained in the case of damage to goods unless a written notice, sufficiently describing the goods concerned, the approximate date of the damage, and the details of the claim, is presented to an office of Carrier within 7 days from the date of receipt thereof, in the case of delay notice presented within 14 days from the date the goods are placed at the disposal of the person entitled to delivery, and in the case of loss (including non-delivery) unless presented within 120 da. s from the date of issue of the air waybill.

(b) Any rights to damages against Carrier shall be extinguished unless an action is brought within two years after the occurrence of the events giving rise to the claim.

(9) The shipper shall comply with all applicable laws, customs and other government regulations of any country to, from, through or over which the goods may be carried, including those relating to the packing, carriage or delivery of the goods, and shall furnish such information and attach such documents to this air waybill as may be necessary to comply with such laws and regulations. Carrier is not liable to the shipper or any other person for loss or expense due to the shipper's failure to comply with this provision.

(10) No agent, servant or representative of Carrier has authority to alter, modify or waive any provision of this contract.

(11) It is expressly stipulated that in the case of non-international carriage in the sense prescribed by the Warsaw Convention, and notwithstanding all other provisions of the General Conditions of Carriage, any responsibility attached to the carrier, in particular responsibility for air risks and errors in the conduct of the aircraft, is excluded so far as permitted and within the limits laid down by the National Laws applicable.

1° Au sens du présent contrat la mot «Convention» désigne la Convention pour l'unification de certaines règles relatives au Transport Aérien International signée à Varsovie le 12 octobre 1929 ou cette même Convention telle que modifiée par le Protocole de La Haye de 1955 selon celui qui est le texte qui sera applicable au transport dont il est question. Le mot «transporteur» désigne la compagnie aérienne qui a émis la lettre de transport aérien ainsi que toutes les Compagnies aériennes qui transportent des marchandises en vertu de la présente lettre de transport ou qui exécutent tout autre service en relation avec ce transport. Pour l'application des dispositions relatives à l'exonération ou à la limitation de la responsabilité, le mot «transporteur» désigne également les préposés, agents et représentants de chacune des compagnies aériennes. Le transport à effectuer par plusieurs transporteurs successifs est considéré comme constituant une opération unique.

2° (a) Le transport effectué en vertu de cette lettre de transport est soumis au régime de responsabilité établi par la Convention, sauf dans le cas où ce transport n'est pas un transport international au sens de ladite convention. (Voir les tarifs du transporteur pour la définition du transport international au sens de la Convention dans les conditions générales de transport du transporteur.)

b) Dans la mesure compatible avec ce qui précède, le transport effectué et tous autres services rendus par le transporteur en vertu de cette lettre de transport, sont régis par:

1. la législation applicable (y compris les lois nationales traitant la Convention ou portant exécution de celle-ci), les décisions, instructions et règlements gouvernementaux;

2. les présentes conditions;

3. les conditions générales de transport, les tarifs et horaires du transporteur, lesquels sont réputés, à l'exclusion des heures d'arrivée et de départ, faire partie intégrante du contrat de transport et peuvent être consultés dans les bureaux du transporteur et aux aéroports où il exploite des services réguliers.

c) Pour l'application de la Convention, les arrêts prévus (susceptibles d'être modifiés par le transporteur en cas de nécessité) sont les lieux autres que les lieux de départ et de destination indiqués au recto de la présente lettre de transport ou figurant aux horaires du transporteur comme des arrêts réguliers sur l'itinéraire.

d) Pour ce qui est des transports soumis à la Convention de Varsovie, l'expéditeur reconnaît que la faculté lui a été offerte de procéder à une déclaration spéciale d'intérêt à la livraison et que la somme portée au recto de la lettre de transport aérien à la rubrique "valeur déclarée par l'expéditeur pour le transport", constitue ladite déclaration spéciale d'intérêt à la livraison si elle dépasse 250 fr. français or (constitué par 65,5 milligrammes d'or au titre de 900 millièmes de fin) par kilogramme ou l'équivalent.

3° Au cas où certaines des conditions contenues ou mentionnées dans la présente lettre de transport seraient contraires à des dispositions impératives légales ou administratives, elles n'en demeureraient pas moins valables dans la mesure permise par ces dernières. Le non-respect de l'une des présentes conditions n'en aura effet sur les autres.

4° Sauf disposition contraire de la Convention ou de la Loi applicable et dans la mesure permise par celles-ci:

a) Le transporteur n'assume aucune responsabilité à l'égard de l'expéditeur ou de toute autre personne en cas de dommages, quelle qu'en soit la nature ou de perte de quelque nature que ce soit (désignés ci-après sous le nom de "dommages") survenus en cours ou à l'occasion du transport des marchandises à moins qu'il ne soit prouvé que de tels dommages résultent de la faute ou du "dol" du transporteur et qu'aucune faute de l'expéditeur, du destinataire ou d'un autre ayant droit n'y a contribué.

b) Le transporteur n'assume aucune responsabilité pour tous dommages résultant directement ou indirectement de l'observation des lois, décisions, instructions, règlements gouvernementaux ou de tout fait échappant au contrôle du transporteur.

c) Il est convenu que, dans le cas où la foi a été ajoutée sur la valeur déclarée par l'expéditeur, la responsabilité du transporteur ne peut en aucun cas être engagée au delà de la valeur sinon déclarée pour le transport et figurant au recto de la présente lettre de transport. En l'absence d'une telle déclaration par l'expéditeur, la responsabilité du transporteur est limitée à 250 francs français or, ou l'équivalent, par kilogramme de marchandise détruite, perdue, endommagé ou retardé; toute réclamation doit être accompagnée de la justification de la valeur.

d) Le transporteur qui émet une lettre de transport en vue d'un transport à effectuer exclusivement par d'autres transporteurs, n'agit qu'à titre de représentant de ces derniers.

5° Il est convenu qu'aucun délai n'est fixé pour l'exécution de ce transport et que le transporteur peut sans préavis se substituer d'autres transporteurs ou utiliser d'autres avions.

Le transporteur n'est pas tenu de transporter les marchandises à bord d'un appareil ou par un ou des itinéraires déterminés ni d'assurer des correspondances en un endroit quelconque en fonction d'un horaire; il peut changer ou modifier la ou les itinéraires même si ceux-ci sont spécifiés au recto de la présente lettre de transport. L'expéditeur se porte garant du paiement des frais et avances.

6° Les marchandises ou colis désignés au recto de la présente lettre sont acceptés en transport à partir de leur remise aux agents ou ville du transporteur, soit aux bureaux de ce dernier à l'aéroport du lieu de départ jusqu'à leur arrivée à l'aéroport du lieu de destination. En cas d'accord exprès, ils peuvent être acceptés pour acheminement jusqu'à l'aéroport de départ et pour réacheminement à partir de l'aéroport de destination.

Si partie acheminement ou réacheminement sont exécutés par le transporteur, ils sont soumis aux clauses de responsabilité des articles 2 et 4 ci-dessus.

Dans tous les autres cas, la Compagnie émettrice et la dernier transporteur, lorsqu'ils procèdent à l'acheminement ou au réacheminement des marchandises, n'agissent que pour le compte de l'expéditeur, du propriétaire ou du destinataire, selon le cas, et ne sont en aucun cas responsables d'un dommage quelconque survenu à l'occasion d'un de ces transports complémentaires à moins qu'il ne soit prouvé que ce dommage résulte de leur faute ou de leur dol.

L'expéditeur, le propriétaire et le destinataire autorisent les transporteurs à faire tout ce qu'ils estimeront nécessaire à l'exécution de cet acheminement ou de ce réacheminement y compris, sans que la présente énumération soit limitative, le choix des moyens d'acheminement ou de réacheminement et des itinéraires (à moins que ceux-ci n'aient été expressément spécifiés par l'expéditeur), l'établissement et l'acceptation des titres de transport (susceptibles de contenir des dispositions limitatives ou exclusives de toute responsabilité), l'expédition des marchandises sans déclaration de valeur malgré le fait que de telles déclarations soient prévues par la présente lettre de transport.

7° Le transporteur peut, sans qu'il y ait là pour lui une obligation, avancer tous droits, taxes ou frais et effectuer tous débours afférents aux marchandises transportées, l'expéditeur, le propriétaire et le destinataire étant solidairement responsables du remboursement de ces sommes.

Aucun transporteur ne sera tenu d'engager quelque dépense que ce soit ou de faire une avance quelconque en vue de l'acheminement ou du réacheminement des marchandises sauf paiement préalable par l'expéditeur.

Si une déclaration d'entrée des marchandises à un contrôle douanier doit être faite, la marchandise sera considérée comme étant adressée à cet endroit à la personne désignée au recto de la présente lettre de transport comme destinataire en douane, ou, si aucune personne n'est désignée à cette fin, au transporteur qui effectue le transport des marchandises à cet endroit ou à tout autre transporteur douanier, s'il en est, désigné par lui.

8° Sur la demande de l'expéditeur et moyennant paiement de la prime correspondante qui devra figurer au recto, les marchandises objet de la présente lettre de transport peuvent être assurées pour le compte de l'expéditeur au moyen d'une police flottante et pour les montants fixés par lui sur la lettre de transport contre tout risque de perte ou de dommages matériels pouvant résulter de toute cause extérieure qu'il qu'elle soit, à l'exception de ceux provenant directement ou indirectement de risques de guerre, de grèves, émeutes, hostilités, saisies légales, retards ou vice propre de la chose et ce, conformément aux termes et conditions de ladite police dont la mise peut être consultée par l'expéditeur. La couverture est limitée à la perte ou au dommage réel que ne pourrait être supérieur à la valeur assurée). Les demandes d'indemnité basées sur cette assurance doivent être immédiatement adressées à un bureau du transporteur.

9° Sauf disposition contraire du présent contrat, la livraison des marchandises ne sera faite qu'au destinataire désigné au recto de la présente lettre de transport. Si, toutefois, le destinataire est l'un des transporteurs participant au transport, la livraison sera faite à la personne désignée sur ce document comme devant être avisée. L'avis d'arrivée de la marchandise est, en l'absence d'instructions contraires, adressé par les voies habituelles au destinataire ou à la personne à aviser.

Le transporteur n'est pas responsable du fait que son avis n'a pas été reçu ou n'a été reçu qu'avec retard.

10° a) Toute réclamation doit être notifiée par écrit à un bureau du transporteur dans les 7 jours de la livraison des marchandises en cas d'avarie, dans les 14 jours de leur mise à la disposition de la personne habilitée à les recevoir en cas de retard, et dans les 120 jours à compter de l'établissement de la lettre de transport en cas de perte (non-livraison comprise). La réclamation doit être accompagnée d'une description sommaire des marchandises en cause, de l'indication de la date approximative des dommages et des détails de la réclamation.

b) Toutes actions contre le transporteur pour dommages sont prescrites dans le délai de deux ans à compter de la survenance de l'événement donnant lieu à réclamation.

11° L'expéditeur se met en règle avec les lois, coutumes et règlements gouvernementaux en vigueur dans les pays de destination, d'origine et de transit des marchandises, y compris les dispositions relatives à l'emballage, au transport et à la livraison des marchandises. Il doit fournir tous renseignements utiles et joindre à la lettre de transport tous les documents exigés par ces lois et règlements. Le transporteur n'assume aucune responsabilité à l'égard de l'expéditeur ou de toute autre personne pour les dommages subis ou les dépenses exposées du fait de l'inobservation par l'expéditeur de la présente disposition.

12° Aucun préposé, agent ou représentant du transporteur n'est habilité à modifier ou enfreindre une disposition quelconque du présent contrat.

13° Il est expressément stipulé que en cas d'un transport non international au sens de la Convention de Varsovie et nonobstant toutes autres dispositions des Conditions Générales de transport, toute responsabilité du transporteur, en particulier la responsabilité à raison des risques de l'air et des fautes commises dans la conduite de l'aéronef, est exclue dans la mesure permise et dans les limites fixées par la droit national applicable.

Complaint

SUPREME COURT : NEW YORK COUNTY

- - - - - - - - - - - - - - - - - -x

CROSBY & COMPANY, INC.,

Plaintiff, COMPLAINT

-against-

COMPAGNIE NATIONALE AIR FRANCE,
also known as AIR FRANCE,

Defendant.

- - - - - - - - - - - - - - - - - -x

Plaintiff, by its attorney, complaining of the defendant, alleges, upon information and belief:

1. At all the times hereinafter mentioned plaintiff was, and still is, a corporation incorporated under the laws of Pennsylvania.

2. The defendant, at all the times hereinafter mentioned was, and still is, a corporation doing business in the State of New York, maintaining offices at various places within the State of New York, including an office at 1350 Avenue of Americas, in the Borough of Manhattan, City and State of New York.

3. On or about February 20, 1968, the plaintiff and the defendant and Marino Bondi entered into an agreement wherein and whereby the plaintiff agreed to ship through the defendant for delivery to Marino Bondi at Toulouse, France, two million pounds of horse meat in weekly quantities of not less than 80,000 pounds, and Marino Bondi agreed to purchase said meat and defendant agreed to properly carry and deliver said meat and pay plaintiff therefor out of funds which Marino Bondi agreed to deposit with the defendant. The said agreement, on the part of said Marino Bondi, by its terms, was conditioned upon his being satisfied with the quality of the meat of a trial shipment of 20,000 pounds.

4. The aforesaid agreement was set forth in documents dated February 1, 1968 and February 16, 1968, a true copy of the whole whereof is annexed hereto, marked Exhibit A, and reference is made thereto for all the terms and conditions.

5. The delivery of the trial shipment to the defendant was delayed, at the request of the

defendant and of Marino Bondi, to the second week in March, 1968, and on Monday, March 11, 1968, the plaintiff delivered to the defendant at Kennedy Airport, in the City of New York, for carriage and delivery to said Marino Bondi at Toulouse, France, a trial shipment of 21,795 pounds of horse meat of the character and quality specified in the agreement, in perfect, sound, healthful and wholesome condition, fit for human consumption, duly and properly wrapped, frozen and refrigerated, in accordance with the provisions of the agreement at the temperature therein specified, and accompanied by the documents specified in the agreement and in proper form and content; and defendant accepted the same under and subject to the terms of said agreement and agreed properly to maintain and carry the same, refrigerated as specified in the agreement, to Toulouse, France, and there deliver the same to Marino Bondi.

6. In breach and violation of the said agreement, the defendant, after receiving the

aforesaid shipment, kept the same without refrigeration for many hours, carried it in an airplane not properly refrigerated, transported the same from Paris to Toulouse in an unrefrigerated or improperly or inadequately refrigerated conveyance.

7. By reason of said failures and omissions by the defendant, the said meat arrived at Toulouse, France, unfit for consumption and was condemned and destroyed by the local authorities.

8. By reason of the said unfitness of the said trial shipment, the aforesaid Marino Bondi notified the plaintiff that he regarded the aforesaid agreement at an end as to him and refused to proceed further thereunder.

9. Solely by reason of the defendant's breach of its part of the said agreement as alleged in paragraph 6 above, plaintiff was deprived of the profit it would have made on the sale to the said Marino Bondi of the two million pounds provided for in the aforesaid agreement.

Complaint

10. By reason of the premises plaintiff was damaged in the sum of not less than $100,000.

WHEREFORE plaintiff demands judgment against the defendant in the sum of $100,000 with interest thereon from August 31, 1968, besides the costs and disbursements of this action.

COPAL MINTZ
Attorney for Plaintiff
150 Broadway
New York, N.Y. 10038

(Verified Oct. 29, 1968)

[Above referred to Exhibit A is reproduced at 60a-69a *supra*]

Answer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

. . . . . .X

CROSBY & COMPANY, INC.,

Plaintiff,

-against-

AMENDED ANSWER

COMPAGNIE NATIONALE AIR FRANCE, also known as AIR FRANCE

Index No.

Defendant.

. . . . . .X

Defendant, Compagnie Nationale Air France, by its attorneys, Haight, Gardner, Poor & Havens, for its amended answer to the complaint herein:

FIRST: Denies that it has knowledge or information thereof sufficient to form a belief as to each and every allegation contained in Paragraphs 1 and 8 of the complaint.

SECOND: Denies each and every allegation contained in Paragraphs 3, 4, and 5 of the complaint except that defendant admits that it had agreed with plaintiff to transport certain horse meat for plaintiff and to make payment therefor from certain funds

to be deposited with defendant; that the documents referred to in Paragraph 4 of the complaint, and annexed thereto as Exhibit A, constitute part of the documents involved in said agreement; that on or about March 11, 1968, plaintiff delivered a trial shipment of 21,795 pounds of horse meat to defendant at John F. Kennedy International Airport for carriage and delivery to the said Marino Bondi at Toulouse, France, which was accepted by defendant pursuant to the terms of its Air Waybill.

THIRD: Upon information and belief, denies each and every allegation contained in Paragraphs 6, 7, 9 and 10 of the complaint.

AS A FIRST AFFIRMATIVE DEFENSE:

FOURTH: That the complaint fails to set forth a cause of action against defendant.

AS A SECOND AFFIRMATIVE DEFENSE:

FIFTH: Plaintiff's loss or damages, if any, were caused by or contributed to by the negligence and omissions of plaintiff.

AS A THIRD AFFIRMATIVE DEFENSE:

SIXTH: Plaintiff failed to perform all of the obligations of the alleged contract required to be performed by it including implied conditions.

AS A FOURTH AFFIRMATIVE DEFENSE:

SEVENTH: Plaintiff's loss or damages, if any, resulted solely and wholly from the fault, neglect and want of care of persons and parties other than the defendant Air France, for whose acts said defendant is not liable and responsible, and not as a result of any negligence, fault or want of care on the part of said defendant or that of its agents, servants and employees.

AS A FIFTH AFFIRMATIVE DEFENSE:

EIGHTH: The contract of transportation alleged to exist between plaintiff and defendant, as evidenced by the Air Waybill issued to plaintiff, contained certain conditions of carriage under which the transportation was to be performed, and said provisions limit defendant's liability and plaintiff's damages as set forth therein.

AS A SIXTH AFFIRMATIVE DEFENSE:

Answer

NINTH: The transportation in which the plaintiff was engaged at the time of the carriage of the goods in question was international transportation by air and a contract of transportation whereby the place of departure was John F. Kennedy International Airport, New York, and the place of destination was Toulouse, France.

TENTH: Said transportation constituted international air transportation within, subject to and governed by the Convention for the Unification of Certain Rules Relating to International Transportation By Air, signed at Warsaw,Poland, on October 12, 1929 and usually known as the "Warsaw Convention". Article 1 of said Convention provides in part as follows:

"Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air

transportation enterprise.

(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of Two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, sizerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting

Party shall not be deemed to be international for the purposes of this convention."

ELEVENTH: Said Convention was adhered to by the Republic of France on November 15, 1932 and by the United States of America by proclamation of the President on October 29, 1934 with the advice and consent of the Senate (49 Stat. pt. 2, 3000, et seq.). The following provisions of said Convention are hereby incorporated as and for a complete or partial defense by the defendant herein without prejudice to raising any other provision which may be shown to be applicable in the course of pre-trial and trial proceedings; Article 5 of said Convention provides, in part, as follows:

"Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an 'air waybill'; every consignor has the right to require the carrier to accept this document."

Article 8 of said Convention provides:

"Article 8

The air waybill shall contain the following particulars:

(a) The place and date of its execution;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the consignor;

(e) The name and address of the first carrier;

(f) The name and address of the consignee, if the case so requires;

(g) The nature of the goods;

(h) The number of packages, the method of packing, and the particular marks or

numbers upon them;

(i) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(m) The amount of the value declared in accordance with Article 22(2);

(n) The number of parts of the air waybill;

(o) The documents handed to the carrier to accompany the air waybill;

(p) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these

matters have been agreed upon;

(q) A statement that the transportation is subject to the rules relating to liability established by this convention."

Article 10 of said Convention provides:

"Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements."

Article 11 of said Convention provides:

"Article 11

(1) The air waybill shall be prima facie evidence of the conclusion of the contract, of the receipt of the goods and

of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be prima facie evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods."

Article 18 of said Convention provides, in part, as follows:

"Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods,

if the occurrence which caused the damage so sustained took place during the transportation by air."

Article 19 of said Convention provides:

"Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods."

Article 20 of said Convention provides:

"Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods, and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in

navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."

TWELFTH: The defendant, Air France, has complied with the provisions of the aforementioned Articles and took all necessary measures to avoid the damages alleged by plaintiff, except for such measures as were impossible for it to have taken. Said defendant therefore claims exemption from liability in accordance with the provisions of said Convention, and more particularly, Article 20 thereof.

AS A SEVENTH AFFIRMATIVE DEFENSE:

THIRTEENTH: Defendant, Air France, repeats and realleges each and every allegation contained in Paragraphs Tenth, Eleventh and Twelfth in this answer with the same force and effect as if herein repeated and set forth at length.

FOURTEENTH: Defendant, Air France, therefore claims exemptions from liability in accordance

with the provisions of said Convention and, more particularly, Article 21 thereof, which provides as follows:

"Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability."

AS AN EIGHTH AFFIRMATIVE DEFENSE:

FIFTEENTH: Defendant, Air France, repeats and realleges each and every allegation contained in Paragraphs Tenth, Eleventh and Twelfth in this answer with the same force and effect as if herein repeated and set forth at length.

SIXTEENTH: Defendant, Air France, therefore claims exemptions from liability in accordance with the provisions of said Convention and, more particularly, Articles 24 and 26 thereof, which articles provides, in part, as follows:

Answer

"Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

* * *

Article 26

(2) In the case of damage, the person entitled to delivery must complaint to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing

dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part."

AS A PARTIAL AFFIRMATIVE DEFENSE:

SEVENTEENTH: Defendant, Air France, repeats and realleges each and every allegation contained in Paragraphs Tenth, Eleventh and Twelfth in this answer with the same force and effect as if herein repeated and set forth at length.

EIGHTEENTH: Defendant, Air France, therefore claims limitation of liability in accordance with the provisions of said Convention and, particularly, Article 22 thereof, which Article provides, in part, as follows:

"Article 22

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time

when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the actual value to the consignor at delivery.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

AS AND FOR A COUNTERCLAIM AGAINST PLAINTIFF CROSBY & COMPANY, INC.

NINETEENTH: At all times hereinafter mentioned defendant was and still is a common carrier of passengers for hire between the City of New York in the State of New York, and the City of Paris, in the Republic of France.

Answer

TWENTIETH: On or about the 11th day of March, 1968, at the request of plaintiff, its officers, agents and employees, defendant issued an Air France airline ticket to David Heckelaar, an employee of plaintiff, covering round trip transportation between New York and Paris-Toulouse for which plaintiff agreed to pay the sum of four hundred sixty dollars and twenty cents($460.20).

TWENTY-FIRST: That the said David Heckelaar used the aforesaid round trip ticket on a flight to and from Paris and Toulouse to conduct plaintiff's business in France.

TWENTY-SECOND: That plaintiff agreed to pay the sum of $460.20 for such ticket within a reasonable time after its issue.

TWENTY-THIRD: No part of said sum of four hundred sixty dollars and twenty cents($460.20) has been paid by plaintiff to defendant although defendant has made due demand upon plaintiff for payment of such sum.

TWENTY-FOURTH: By reason of the above, defendant has been damaged in the sum of four hundred

sixty dollars and twenty cents ($460.20) with interest from March 11, 1968.

AS AND FOR A SECOND COUNTER-CLAIM AGAINST PLAINTIFF CROSBY & COMPANY, INC.

TWENTY-FIFTH: That in May, 1968, one Marino Bondi, the consignee of the trial shipment herein, commenced an action in the Republic of France against the defendant herein to recover the sum of($5,687.97) he had paid to defendant as a condition precedent to delivery of the trial shipment of horse meat plus interest thereon; the said sum having been turned over to plaintiff by defendant herein in its capacity as transmittal agent for funds.

TWENTY-SIXTH: That if defendant herein is held liable in the suit in Toulouse, France, the plaintiff herein, Crosby & Company, is primarily responsible therefor and liable over and bound to indemnify the defendant, Air France, for the amount of any recovery by said Marino Bondi against Air France, by reason of the fact that plaintiff breached its contract with Marino Bondi, the defendant herein

having complied with all conditions on its part required to be performed.

TWENTY-SEVENTH: By reason of the foregoing, the defendant is or will be damaged in any amount of any recovery which may be obtained by Marino Bondi if said Marino Bondi is successful in his claim against defendant in the French action, said suit being in the sum of at least $5,687.97, the amount of the payment made to the plaintiff herein.

WHEREFORE, defendant demands judgment dismissing the complaint against it and, in the alternative, for judgment limiting its liability under the provisions of the Warsaw Convention; and for judgment against the plaintiff on its counterclaim in the sum of four hundred and sixty dollars and twenty cents ($460.20) with interest from March 11, 1968; and for judgment against the plaintiff on its counterclaim in a sum to be determined upon the outcome of an action presently pending in

Toulouse, France, together with the costs and disbursements of this action.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
Compagnie Nationale Air France
80 Broad Street
New York, N. Y. 10004

(Verified April 25, 1969)

LETTER AIR FRANCE TO CROSBY 3/26/68

(AIR FRANCE LETTERHEAD)

March 26, 1968

Mr. Crosby
Crosby & Company
300 Sixth Avenue
Pittsburgh, Penn. 15222

Dear Mr. Crosby:

Attached please find our check #63930 for an amount of $5,687.97 in payment of air waybill 057/2946464 shipped to Messrs. Bondi & Company in Toulouse.

Please be advised that the entire shipment had to be destroyed in Toulouse as it arrived in state of putrefaction and the French Authorities did not allow any consumption whatsoever of the meat.

You are, of course, aware that Mr. Bondi attempted at all times to obtain delivery of the consignment, but same was refused by the veterinary inspectors on the grounds that the meat was too old and had been previously refrigerated.

Under these circumstances, we have collected from Bondi & Company payment for the meat on basis of the contract between your company

LETTER AIR FRANCE TO CROSBY 3/26/68

and theirs. We are therefore settling the invoice value of the shipment and advise you that Bondi has taken steps to file a claim for the total loss of the shipment.

We take this opportunity to inform you that a recent import policy change in France prevents currently any other trial shipments and that Messrs. Bondi would advise us later if any importation of horse meat is re-instated.

We shall not fail to keep in touch and remain

Very truly yours,

M. Khozame

p.o. Joseph R. Saccone
New York Cargo District
Manager

JRS:mk

NYC.FF 30.027

LETTER CROSBY'S ATTORNEY TO AIR FRANCE
8/13/68

August 13, 1968

Air France
1350 Avenue of Americas
New York, N.Y.

Gentlemen:

Crosby & Company, Inc. of 300 Sixth Avenue, Pittsburgh, Pennsylvania has retained me to prosecute its claim against you for damages for your breach of its contract with you dated February 1, 1968 as modified by letters dated February 16 and February 20, 1968 covering a sale to Marino Bondi at Toulouse,France, of 2,000,000 pounds of horse meat to be transported by you and to be paid for by you in behalf of Marino Bondi.

The agreement was irrevocable and called for delivery in weekly installments from on or about March 1, 1968 to August 31, 1968, but was subject to "one trial shipment the first week of March 1968 of 20,000 LBS', and in the event the "quality" of those 20,000 LBS be "not satisfactory to Marino Bondi" the contract "will be void". The contract also provided that the meat

LETTER CROSBY'S ATTORNEY TO AIR FRANCE
8/13/68

shall be frozen "in winter at a temperature 0°C to +2°C in the summer +2°C to 4°C".

Because of the improper handling by Air France of the trial shipment, March 11 - 15, 1968 - principally, as I am informed, storing it overnight and to midafternoon without refrigeration, inadequate refrigeration in flight and transshipment without adequate refrigeration - the meat upon its arrival at Toulouse, France was condemned by the local authorities.

Because when the trial shipment arrived, its quality was not satisfactory - as clearly it was not - Marino Bondi elected to regard the contract as voided, causing my client a loss of profits which my client informs me can be demonstrated to amount to a minimum of $100,000.

I suggest, if I may, thatyou examine your records pertaining to this matter and let me know what your attitude is towards this claim. The above referred to contract was entered into with your Cargo Division, Joseph R. Saccone,

LETTER CROSBY'S ATTORNEY TO AIR FRANCE
8/13/68

New York Cargo District Manager.

Yours very truly,

s/ Copal Mintz

Copal Mintz

cm;bmh

SUPREME COURT, U. S.

FILED

APR 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM 1973**

**No. 73-1519**

CROSBY & COMPANY, INC.,

*Petitioner,*

*against*

COMPAGNIE NATIONALE AIR FRANCE,
also known as AIR FRANCE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RANDAL R. CRAFT, JR.,
*Of Counsel*

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In the

# Supreme Court of the United States

**OCTOBER TERM 1973**

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**No. 73-1519**

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Crosby & Company, Inc.,

*Petitioner*

*against*

Compagnie Nationale Air France,
also known as Air France,

*Respondent.*

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On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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### Opinions Below

The Petition seeks the issuance of a Writ of Certiorari to review the order and judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department [pp. 16a-17a of the appendix to the Petition], 42 App. Div. 2d 1050, that unanimously affirmed the judgment of the Supreme Court of the State of New York, New York County [21a-24a], granting defendant's motion for summary judgment dismissing plaintiff's complaint and granting defendant's counter-claim. It is im-

portant to note here that the memorandum decision of the Supreme Court, New York County [25a-50a] contains a number of alternative independent and adequate grounds for granting the summary judgment dismissing plaintiff's complaint. The first such holding was that Respondent's "only legal obligation under the alleged agreement was to act as a transfer agent of funds for Marino Bondi", Petitioner's consignee [30a]. An independent and dispositive second holding is that Respondent did not assent to any provisions in the agreement alleged by Petitioner which would render Respondent liable for the damages sought herein and that Respondent did not contemplate that the agreement alleged by Petitioner would render Respondent liable for the damages sought herein [31a-33a]. As an additional independent alternative ground for dismissing plaintiff's complaint, the Supreme Court, New York County, held that, even if Respondent was found to have breached its obligations under the alleged agreement, and even if Respondent assented to or contemplated liability for the claims herein, Respondent's liability and the time for Petitioner to have given Respondent written notice of its claims were limited by the Warsaw Convention [34a-37a]. It was further alternatively held that, even if the Warsaw Convention was not applicable, Respondent's liability and the time for Petitioner to have given Respondent written notice of its claims were similarly limited by Respondent's conditions of carriage, which were made applicable by each of the following: (1) Respondent's tariff; (2) the air waybill; and (3) the express reference thereto in the alleged agreement. Of course, it was also held that Petitioner did not submit a written claim to Respondent within the requisite time.

## Jurisdiction

The Petition states that the jurisdiction of this Court is founded upon 28 U.S.C. § 1257(3) in that a right, privilege,

or immunity is specially set up or claimed under treaties or statutes of the United States. The Petition fails to point out what is indicated in the preceding discussion, i.e., that the judgment below is based upon both federal and non-federal grounds and that the non-federal grounds are enough to dispose of this action. As will be set forth below in more detail, this Court does not exercise jurisdiction over cases in which the judgment below was based upon independent and non-federal questions. Consequently, it is respectfully submitted that, in accordance with its usual practice in such cases, this Court should decline to review this case for lack of jurisdiction.

## Questions Presented

As indicated above, the Petition fails to deal with the alternative independent and adequate holdings in the decision of the Supreme Court, New York County. For example, none of the questions presented by Petitioner on this appeal relate to the first two non-federal holdings, each of which was a sufficient ground upon which to grant the summary judgment. In addition, the alternative holdings below are not properly or separately presented as alternatives in the Petition. The following questions were actually raised and determined below, and, if this Court issues a writ of certiorari to review the judgment below, these will be the questions presented:

1. Was Respondent's only legal obligation under the alleged agreement to act as a transfer agent of funds from the consignee to Petitioner and did Respondent fulfill that obligation?

   Answer of the court below: Yes [30a-31a].

2. Did Respondent assent to any provisions in the agreement alleged by Petitioner that would render Respondent liable for the damages sought herein or did Re-

spondent contemplate that the agreement alleged by Petitioner would render Respondent liable for the damages sought herein?

Answer of the court below: No [31a-33a].

3. Is the monetary limitation of liability of Article 22 of the Warsaw Convention applicable to Petitioner's claims herein?

Answer of the court below: Yes [34a-37a].

4. Does Article 26 of the Warsaw Convention limit the time for Petitioner to have given written notice to Respondent of its claims herein and did Petitioner fail to give such notice within that time?

Answer of the court below: Yes [35a-37a].

5. Do Respondent's conditions of carriage limit Respondent's liability for Petitioner's claims herein as a result of each of the following: (1) Respondent's tariff, (2) the air waybill, and (3) the express reference thereto in the alleged agreement?

Answer of the court below: Yes [44a-47a].

6. Do Respondent's conditions of carriage limit the time for Petitioner to have given Respondent notice of its claims herein as a result of each of the following: (1) Respondent's tariff, (2) the air waybill, and (3) the express references thereto in the alleged agreement; and did Petitioner fail to give such notice within that time?

Answer of the court below: Yes [44a-47a].

7. Is Petitioner obligated by law to pay Respondent the price of the ticket of Petitioner's employee who accompanied the trial shipment?

Answer of the court below: Yes [47a-49a].

In addition, if this Court issues a writ of certiorari to review the judgment below, Respondent will raise, as it did below, the question of whether there was any consideration—mutuality of obligation—to support the agreement alleged by Petitioner. The court below did not actually pass on this question but, as indicated above, simply held that Respondent's obligation to Petitioner was not as Petitioner alleged.

## Treaties and Statutes Involved

The pertinent provisions are set forth in the Petition at pages 7-8 and 1a-14a.

## Statement of the Case

Insofar as the factual background of this matter is concerned, this Court is respectfully referred to the description of the facts contained in the memorandum decision below [25a-29a]. This description is much fairer and to the point than the "Statement of the Case" in the Petition at pages 8-21.

## ARGUMENT: REASONS FOR DENYING THE WRIT

### I. This Court should decline jurisdiction because the judgment below is based upon independent and adequate non-federal grounds.

As indicated above, the judgment below is based on the memorandum decision of the Supreme Court, New York County that initially sets forth two independent and adequate non-federal grounds for dismissing plaintiff's complaint herein. Notwithstanding the Petitioner's strained contrary view, both of these initial holdings were completely non-federal in that they were based solely on the

courts' interpretation of the letters alleged by Petitioner to constitute the agreement upon which Petitioner's action is based [30a-33a].

Particularly apposite here is the following language from *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935):

> [W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger* v. *Missouri*, 13 Wall. 257, 263, and has been reiterated in a long line of cases since that time.

In *Fox*, a holding below regarding the construction of a contract was found by this Court to involve a dispositive non-federal question. As a result, this Court dismissed the writ for want of jurisdiction, even though there was a second holding below that the contract in question was invalid under federal law. *Cf. Wilson* v. *Loew's, Inc.*, 355 U.S. 597 (1958).

Consequently, it is respectfully submitted that this Court lacks jurisdiction over this case and should decline to issue a writ of certiorari to review the judgment below.

## II. There are no special or important reasons for reviewing the judgment below.

The memorandum decision of the Supreme Court, New York County, upon which the judgments below are based raises no important issues worthy of this Court's review. That decision's comprehensive discussion of the federal law is accompanied by extensive citations to particular federal decisions and provides a clear demonstration that well-established federal precedent was properly applied to the federal questions herein on the basis of uncontested

documentary evidence. It should also be mentioned that there is no decisional conflict requiring resolution by this Court and that the decision below does not call into question the validity of any provision of the federal Constitution, treaties, or federal statutes.

Though the controversy itself may be "significant", no novel theory of federal law was applied nor was any federal law applied in a novel fashion. The only novel aspect of this case is the factual situation, which mitigates against further review; for a decision by this Court in the factual context of this case would be unlikely to assist in resolving other litigation.

Therefore, it is respectfully submitted that there are no special or important reasons for reviewing the judgment below and that this Court should decline to issue a writ of certiorari to review that judgment.

## III. The judgment below is correct.

Rehashing here the merits of Respondent's claims in the lower courts would be inappropriate. In the course of this litigation, Respondent has submitted numerous and voluminous affidavits and briefs, and they cannot be briefly summarized. On the other hand, it is our understanding that this Court does not desire to have a lengthy discussion of merits in a brief in opposition to a petition for a writ of certiorari. However, for present purposes, Respondent is confident that the memorandum decision of the Supreme Court, New York County, adequately speaks for itself. The Petitioner has raised no issues of law or fact that in any way reflect upon the soundness of that decision or upon the unanimous affirmance by the Appellate Division. Basically, the Petition is marked by a manifest misunderstanding of the holdings below (which misunderstanding has resulted in gross overstatement as to the consequences of those holdings). The Petition also includes a number

of calculated irrelevancies. Most importantly, the Petition is patently founded upon various conclusory statements as to the applicable law that are unsupported by any decisional authority whatsoever. This is to be contrasted to the numerous citations to appropriate precedents that are found in the memorandum decision below.

Consequently, it is respectfully submitted that the judgment below correctly determined the merits of this case and that this Court should decline to issue a writ of certiorari to review that judgment.

## CONCLUSION

**This Court lacks jurisdiction over this case. Furthermore the record of this case contains nothing that warrants review by this Court. Therefore, the petition for a writ of certiorari should be, in all respects, denied.**

Respectfully submitted,

WILLIAM J. JUNKERMAN,
*Counsel for Respondent*

RANDAL R. CRAFT, JR.,
*Of Counsel*

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Supreme Court
FILED
MAR 26 1974
MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1519

CROSBY & COMPANY, INC.,

*Petitioner,*

*against*

COMPAGNIE NATIONALE AIR FRANCE,
also known as AIR FRANCE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

## REPLY MEMORANDUM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

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No. 73-1519

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CROSBY & COMPANY, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

---

## REPLY MEMORANDUM

Respondent's argument that the judgment herein "is based upon independent and adequate non-federal grounds" is insupportable for each of the three reasons indicated at pages 28-30 of the petition, to wit:

1. The contract herein with a foreign international carrier for air carriage of cargo from New York to Toulouse, France, is governed exclusively by Federal law: a treaty, Federal statutes, a permit granted by a Federal agency and rules and tariffs filed with that agency.

2. The judge who decided this case did not hold that, as a matter of construction, the provisions of the contract imposed no obligation on Air France as a carrier. He said that "Air France's only legal obligation ... was to act as a transfer agent of funds" (see Petition at p.30a) and that that was "the only obligation that could have been legally imposed" (Id. at p. 31a). At no point did the judge refer to state law or to state decisions applying state law. Thus, his conclusion of absence of "legal obligation ... [other than] to act as a transfer agent of funds ..." was shaped by, and predicated on, his misconceptual reading of the Federal decisions and the Warwas Convention which he so abundantly cited in his lengthy memorandum decision. It is clear that the

judge did not conceive himself to be applying state law on any phase of the case.

3. If, moreover, his holding be viewed as a construction of the terms of the contract on the basis of unmentioned New York authorities, it appears from the pertinent New York cases (see footnote on p. 30 of the Petition) that such a construction "is so certainly unfounded that it properly may be regarded as essentially arbitrary" (Enterprise Irrigation District v. Canal Company, 243 U.S. 157, 164, 1917, approvingly cited in Fox Film Corp. v. Muller, 296 U.S. 207, 210-11 (1935), which respondent quotes at page 6 of its brief).

In that Fox Film case, the state court held that the conceded invalidity of the arbitration clause, as a matter of state law established by the cited state court decisions, voided the entire contract. On that dispositive point, this Court deemed itself bound by that determination of applicable state law.

In Wilson v. Lowe's, Inc., 355 U.S. 597 (1958), this Court held itself bound by a state

court's determination that the complaint in that state court action was technically deficient -- surely not a matter for this Court to review.

Thus, ignoring cases cited at page 30 of the Petition, respondent has cited two cases which do not support its contention.

Respectfully submitted,

COPAL MINTZ
Counsel for Petitioner

April 25, 1974.